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In The
Supreme Court of the United States

NICOLAS CARRANZA,
Petitioner,

v.

ANA CHAVEZ, CECILIA SANTOS, JOSE CALDERON, ERLINDA FRANCO, and DANIEL ALVARADO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a United States Court could or should exercise jurisdiction under the Alien Tort Claims Act, 28 U.S.C. Sec. 1350, and the Torture Victims Protection Act, Note to 28 U.S.C. Sec. 1350, in derogation of El Salvador's Amnesty Law which was enacted for the express purpose of ending El Salvador's civil war, against a defendant covered by the amnesty, for misdeeds alleged to have been committed in El Salvador during the course of that country's civil war.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the case in the United States Court of Appeals for the Sixth Circuit are named in the caption.

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NICOLAS CARRANZA,
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ANA CHAVEZ, CECILIA SANTOS, JOSE CALDERON, ERLINDA FRANCO, and DANIEL ALVARADO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Nicolas Carranza respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Appendix ["App."] A) is reported at *Chavez et al. v. Carranza*, 559 F.3d 486

(6th Cir. 2009). The August 15, 2006 opinion of the United States District Court for the Western District of Tennessee (App. B) is unreported. The October 25, 2005 opinion of the United States District Court for the Western District of Tennessee (App. C) is reported at 413 F. Supp. 2d 891 (W.D. Tn. 2005). The October 17, 2005 opinion of the United States District Court for the Western District of Tennessee (App. D) is unreported. The September 30, 2004 opinion of the United States District Court for the Western District of Tennessee (App. E) is reported at 407 F. Supp. 2d 925 (W.D. Tn. 2004).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 17, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Alien Tort Claims Act, 28 U.S.C. Sec. 1350 ("ATCA"), The Torture Victims Protection Act, Note to 28 U.S.C. Sec. 1350 ("TVPA"), and the Republic of El Salvador Law of General Amnesty for the Consolidation of Peace, Legislative Decree No. 486, March 20, 1993 ("Amnesty Law"), are set forth in Apps. F, G and H, respectively.

STATEMENT OF THE CASE

El Salvador was beset by civil war from 1980 until 1992. At odds in this country the size of Rhode Island were leftist guerillas united under the Farabundo Marti National Liberation Front ("FMLN") and the government of El Salvador.

The United States Department of State estimates that the war cost El Salvador some 70,000 killed. *Fifteenth Anniversary of the Peace Accords*, Dept. of State Press Statement, January 16, 2007 ("*Anniversary Message*")[1].

The parties were citizens of El Salvador during the period pertinent to this case. Respondents allege various abuses to include torture and murder visited on them or on loved ones by Salvadoran security forces during the course of the war. Petitioner was a Salvadoran Army colonel who served as Sub-Minister to the Minister of Defense from October 1979 until January 1981 and as Director of the Treasury Police from June 1983 until May 1984. Citing the principle of command responsibility, Respondents have claimed against Petitioner under ATCA and TVPA for the alleged actions of subordinates allegedly subject to his command.

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[1] *Available at* http://2001-2009.state.gov/r/pa/prs/ps/2007/78920.htm. Petitioner requests the Court take judicial notice of this official publication pursuant to Fed. R. Evid. 201.

The war ended with the signing in Mexico City of the Agreement of Chapultepec of January 16, 1992. Chapter VI, Section 1, of the agreement, "Political Participation of the FMLN," as translated from the Spanish in which the agreement is written, requires:

> "the adoption of legislative or other measures as are necessary to guarantee to ex-combatants of the FMLN the full exercise of their civil and political rights in order that they be legally reintegrated into the civil, political and institutional life of the country.

This provision led to the passage of the Amnesty Law which, as translated from Spanish, reads in part:

> "In Consideration:
>
> I. That the process of consolidation of peace underway in our country demands the creation of confidence in all of society, toward the end of achieving the reconciliation and reunification of the Salvadoran family by means of legal measures for immediate effect which guarantee to all inhabitants of the republic the full development of their activities in an atmosphere of harmony, respect and confidence for all the social sectors...

> IV. That in order to impel and achieve national reconciliation it is appropriate to convey the grace of full, absolute and unconditional amnesty to all persons who have in any manner participated in crimes occurring prior to January 1, 1992, be they political or common in nature...

App. 110a, 111a.

The amnesty granted by the law was neither unilateral nor a simple concession to the Salvadoran armed forces and their confederates. It was instead the product of a painfully negotiated compromise between all the combatants, which compromise was actively promoted by the United Nations and brokered by the governments of several nations to include the United States. The terms of the compromise, that is to say the Amnesty Law, were sought and agreed to by all the combatants for the purpose of protecting all the combatants as a prerequisite to the national healing necessary for an enduring peace. It bears noting that the Amnesty Law bears the name of Ruben Zamora as a Vice President of the Legislature. Ruben Zamora was a member of the Frente Democratico Revolucionario ("FDR"). *El Salvador: A Country Study*, Washington GPO for the Lib. of Congress, 1988, at "Left-Wing Parties."[2] Until 1987, the FDR was a partner of the FMLN as noted below.

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[2] *Available at* http://memory.loc.gov/frd/cs/svtoc.html. Petitioner requests the Court take judicial notice of this official publication pursuant to Fed. R. Evid. 201.

The criticality of the amnesty to El Salvador's peace is acknowledged in the State Department's statement quoting the United States government representative tasked at the time with ensuring the success of the peace negotiations.

> "That immunity, said [the United States *charge d'affaires* charged with ensuring the success of the peace negotiations, Peter] Romero, 'helped get the country beyond its civil strife and violence and moved it forward'... [I]n light of more recent conflicts where people have argued that it's more important to seek justice than it is to move the country ahead... Romero said his experience from El Salvador 'is that you need to get all the parties to agree' to a peace agreement, and 'one of the key ingredients' for achieving that end is 'if combatants know they will not be prosecuted subsequently for human rights abuses.' Granting such amnesty, said Romero, is not a 'perfect' solution, but does help move a country forward.

El Salvador Called Example to World for Healing Wounds of War, Bureau of International Information Programs, USINFO, January 22, 2007 ("*Example to World*").[3]

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[3] *Available at* http://www.america.gov/st/washfile-english/2007/January/20070122173614lXEneerG0.3538782.html. Petitioner requests the Court take judicial notice of this official publication pursuant to Fed. R. Evid. 201.

The Department of State also acknowledges in its "*Example to World*" statement the "distinctly critical" role of the United States government in the formulation of the peace accords and the Amnesty Law:

> "Former U.S. diplomat Peter Romero, who was *charge d'affaires* at the U.S. Embassy in El Salvador during the Salvadoran peace negotiations, told *USINFO* January 19 that the peace accords and their implementation in El Salvador represented 'multilateralism at its best.'
>
> " 'A four-nation group dubbed 'the Friends of El Salvador' -- Colombia, Venezuela, Spain, and Mexico -- plus the United States and the United Nations worked to bring about a comprehensive peace agreement and to ensure its implementation', Romero said.
>
> "Romero said he was dispatched to serve as the U.S. 'unofficial' representative to the peace negotiations, with the United States playing an 'understated' but 'distinctly critical role' for helping to ensure that the Salvadoran government and the FMLN kept to their commitments made in the peace accords. Romero said the United States provided about $270 million per year and other incentives to

> El Salvador to bring about implementation of the accords.

Example to World.

The State Department commends El Salvador's progress as a democracy in the wake of the Amnesty Law, proclaiming 15 years after the peace accords:

> "In this time, El Salvador's transformation has been impressive. With U.S. and U.N. support, the former insurgents are a well established political party. El Salvador is a vibrant and free democracy, and its expanding economy and increasing trade are translating into increased living standards for all Salvadorans. El Salvador's example demonstrates that war torn countries can transition to successful post conflictive societies.

Anniversary Message.

On March 15, the Salvadoran people vindicated the State Department's faith in their democracy by electing as President, Mauricio Funes of the FMLN.

I. Proceedings in this Case.

a. The Trial

The trial before a jury was preceded by Petitioner's motion to dismiss pursuant to the 10 year statute of limitations governing the ATCA and the TVPA on the grounds that the claims filed in December 2003 did not timely address the subject abuses alleged to have occurred in the early 80's. The trial court denied the motion, finding that feared reprisals in El Salvador constituted "extraordinary circumstances" tolling the statute until March 1994 when the first post-war elections were held. App. 99a, 103a.

The trial court allowed Terry Karl, an academic with no military experience, to testify as an expert on the Salvadoran military. Sixth Circuit Joint Appendix ("JA"), Vol. III 598-99, 667-68.

The trial court overruled Petitioner's objection to the admission of a variety of evidence. This included a United States Defense Intelligence Agency report denied by its putative author. Additionally, it included highly graphic photographs of cadavers bereft of any demonstrated connection to Petitioner. App. 41a, 42a.

It was undisputed at trial that the allegations against Petitioner fell within the class of crimes covered by the civil and criminal immunity created by El Salvador's Amnesty Law. App. 87a, 88a. Nonetheless, the trial court refused to recognize immunity for Petitioner Carranza for the reason that

the Amnesty Law, in the trial court's opinion, did not address claims made outside of El Salvador. App. 36a. The trial court reached this decision after refusing to hear the testimony of the only witness, Petitioner's expert Dr. David Escobar Galindo, proffered by any party to explain the provenance and effect of the Amnesty Law. Dr. Galindo is not only a lawyer, but participated in the peace negotiations that produced the Amnesty Law and ended the civil war. JA, Vol. III 770-71. The trial court found that Dr. Galindo's testimony would have comprised a "legal conclusion, and one that an expert may not draw." App. 37a.

b. The Decision of the United States Court of Appeals for the Sixth Circuit

The Sixth Circuit begins by affirming the equitable tolling of the statute of limitations, quoting directly from the legislative history of TVPA to the effect that the statute is tolled while a defendant enjoys "immunity from suit." App. 8a (quoting S. Rep. No. 102-249, at 10-11). Clearly, Congress intended that TVPA would not overbear a foreign amnesty.

Notwithstanding her lack of any military experience, the Sixth Circuit finds Terry Karl's claimed expertise on the Salvadoran military was properly established because "she discusses her credentials as an expert in the politics of Latin America," but specifies none of said credentials or their pertinence to El Salvador as opposed to Latin America, much less to its military. App. 18a, 19a.

The Sixth Circuit demonstrates in other regards an overweening accommodation of Respondents in numerous regards:

> The court recites that "widespread human rights abuses were carried out by the Salvadoran military during the country's civil war..." App. 10a, but at no point says anything about guerilla misdeeds. Significant guerilla abuses, however, are detailed in the Truth Commission Report entered into evidence at the trial (e.g. murders of mayors and other public figures and of unarmed United States military personnel). JA, Vol. IV 1009-36.
>
> Notwithstanding Colonel Brian Bosch's assertion that he did not author a prejudicial report attributed to him, the court somehow finds this does not amount to his disputing "its authenticity." App. 20a.
>
> The court finds highly graphic photographs of cadavers published to the jury "demonstrate that Carranza had notice of the human rights violations committed by his subordinates," notwithstanding the record is silent as to the authors of the subject deaths or of Petitioner's contemporaneous knowledge of the photographs. App. 21a.

The Sixth Circuit speculates that Respondents' claims would be "barred" in El Salvador. App. 14a. However, the Supreme Court of El Salvador has specifically inferred the discretion of Salvadoran courts to waive the immunity of the Amnesty Law in particular cases involving "fundamental human rights." Cases 24-97 and 21-98, Sup. Ct. of El Sal., (Sept. 26, 2000), Sec. VII(2).[4] Rather than exhaust that remedy, Respondents have sought to be accommodated in the more favorable venue of an American court. However, the importance of a Salvadoran remedy should not be dismissed, particularly since the party of the former guerillas, the FMLN, now comprises the largest party in the Salvadoran Legislature and will control the executive branch after the change of government on June 1.[5] The courts of this country, on the other hand, are woefully ill equipped to adjudicate events of nearly 30 years ago in Central America, particularly since most of the people able to elucidate those events from first-hand knowledge are beyond the reach of American courts.

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[4] *Available at* http://www.jurisprudencia.gob.sv/Jindice.htm. Search "constitucional," "inconstitucionalidades," "sentencias definitivas," "2000," and "24-97 ac 21-98." Petitioner requests the Court take judicial notice of the decision pursuant to Fed. R. Evid. 201.

[5] CRS Report RS21655, *El Salvador: Political, Economic, and Social Conditions and U.S. Relations*, "2009 Elections," by Claire Seelke and Peter Meyer, *available at* http://fpc.state.gov/documents/organization/121836.pdf. Petitioner requests the Court take judicial notice of this official publication pursuant to Fed. R. Evid. 201.

The Sixth Circuit affirms the trial court's finding that there is no conflict between El Salvador's Amnesty Law and the ATCA and TVPA, notwithstanding the trial court refused to hear the only evidence proffered on the effect of the foreign statute, the testimony of Petitioner's expert, Dr. Galindo. The Sixth Circuit found simply that "[a]n expert opinion on a question of law is inadmissible." App. 22a. However, the precedent upon which the appellate court relied, *Berry v. City of Detroit*, 25 F.3d 1342, 1346-55 (6th Cir. 1994), concerned an unqualified expert testifying about an ultimate question of liability and had nothing to do with expert testimony on foreign law. In fact, the Sixth Circuit has more than once affirmed the permissibility of expert testimony before a court only to explain a foreign law. *See Johnson v. Ventra Group*, 191 F.3d 732, 742 (6th Cir. 1999); *Tschira v. Willingham*, 135 F.3d 1077, 1084 (6th Cir. 1998).

The Sixth Circuit reviewed the decision of the trial court "not to grant comity to the Salvadoran Amnesty Law for an abuse of discretion." App. 13a. Comity, however, is only one of several analyses under which the Amnesty Law should have been granted full faith and credit by the trial court. The threshold question as to whether the jurisdiction of ATCA and of TVPA encompass the claims at bar is a question of law as would be any subsequent choice of law determination between the Amnesty Law and the statutes subject of the claims. Questions of law are reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). The Sixth Circuit, in fact, has specifically held that a threshold finding as to jurisdiction under ATCA is reviewed *de novo*,

Taveras v. Taveraz, 477 F.3d 767, 771 (6th Cir. 2007), as is a choice of law determination, *Merida Prods. v. Abbott*, 447 F.3d 861, 865 (6th Cir. 2006).

The Sixth Circuit incorrectly gleans from *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764 (1993), the notion that comity has no application absent "an actual conflict between the domestic and foreign law," which it describes as a circumstance where a party's compliance with both is impossible. App. 14a. In fact, *Hartford* nowhere so says. *Hilton v. Guyot*, 159 U.S. 113 (1895), from which *Hartford* quotes, imposes no such threshold limitation on considerations of comity, which it describes as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation..." *Id.* at 164. *Hartford* entailed British insurers sued for anticompetitive conduct that "produced substantial effect," 509 U.S. at 796, within the United States, with the consequence that "international comity would not counsel against exercising jurisdiction in the circumstances alleged here." *id.* at 798. As such, *Hartford's* conflict analysis was undertaken in lieu of, not as a prerequisite to, comity considerations. Moreover, *Hartford's* exercise of anti-trust jurisdiction over foreign conduct with substantial domestic repercussions has little relevance to the case at bar wherein the domestic consequences were nil.

The Sixth Circuit dismisses out of hand the pertinence of *F. Hoffmann-LaRoche v. Empagram*, 542 U.S. 155 (2004), because that decision does not specifically entail ATCA or TVPA. App. 15a. *Hoffmann* involves the Foreign Trade Antitrust

Improvements Act ("FTAIA") which excludes from this nation's antitrust jurisdiction "much anticompetitive conduct that causes only foreign injury." *Id.* at 158. While the FTAIA is primarily domestic in its prescriptive focus, the authorities and principles cited in *Hoffmann* restricting extraterritorial prescriptive jurisdiction are by no means limited to the FTAIA. The *Restatement (Third) of Foreign Relations Law of the United States*, on which *Hoffmann* relies, can hardly be said to be so limited.

The Sixth Circuit improvidently looks to *BMW Stores, Inc. v. Peugeot Motors of America*, 860 F. 2d 212 (6th Cir. 1988), for the proposition that a statute has no extraterritorial effect unless it bears a clear indication that it was intended to apply outside the country enacting it. App. 14a. In fact, *BMW* involved no foreign country, but only refused to apply in Ohio a Kentucky law restricting automobile franchises. The *BMW* court simply reasoned that a Kentucky law intended to protect "the citizens of the State of Kentucky" should not be applied to the detriment of a Kentucky franchisee for the sole benefit of an Ohio franchisee. 860 F. 2d at 215. The situation at bar is the converse. Application of the Amnesty Law would benefit El Salvador and its populace as the statute was intended to do, while a failure of such application would have the opposite effect. Moreover, the *BMW* court inquired whether a law revealed an intention to proscribe an extraterritorial act. Proscribing an extraterritorial act is vastly different from proscribing the effect to be given a statute by another sovereign. One sovereign cannot legislate the affairs of another and

any such suggestion in the Amnesty Law – or any law – would be a nullity.

Finally, the Sixth Circuit neglects to consider, or even to mention, this Court's latest ruling on ATCA, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), or most of the prudential concerns delineated therein: the balance of contacts and interests of the states involved, the commitment of the matter to a political branch, and the practical consequences of exercising jurisdiction.

REASONS FOR GRANTING THE PETITION

I. The Prescriptive Jurisdiction of the Alien Tort Claims Act and the Torture Victims Protection Act Does Not Extend to this Case.

The Sixth Circuit's refusal to accord full faith and credit to El Salvador's Amnesty Law constitutes an unwarranted intrusion into the sovereign affairs of another nation. Notwithstanding the Sixth Circuit's offhand dismissal of its relevance, this Court's decision in *F. Hoffmann-La Roche v. Empagran*, 542 U.S. 155 (2004), illustrates clearly the limitations inherent in overseas application of prescriptive jurisdiction.

Hoffmann dealt with FTAIA and Sherman Act claims that included foreign conduct with strictly foreign repercussions. This Court cited the *Restatement (Third) of Foreign Relations Law of the United States* Secs. 403(1) and (2) for the principle that limits the "unreasonable exercise of prescriptive

jurisdiction with respect to a person or activity having connections to another State." Consequently, this Court ruled that the application of our antitrust laws to other nations that have their own regulatory schemes when there is no domestic harm "creates a serious risk of interference with a foreign nation[]..." *Hoffmann*, 542 U.S. at 165.

This Court noted in *Hoffmann* [quoting a petitioner's pleading] that United States courts should not provide a venue "to any foreign suitor... unhappy with its own sovereign's provisions for private anti-trust enforcement..." 542 U.S. at 166. This describes perfectly Respondents, in the context of anti-trust instead of tort, who have failed to exhaust their local remedies as required by Sec. 2(b) of TVPA and presumably by ATCA as well. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, n.21 (2004).

The trial court's decision undermines the very vehicle of El Salvador's transformation from a war torn charnel house to a robust democracy. *Hoffmann* decries an incursion of American anti-trust regulation that diminishes other countries' anti-trust regulation as "legal imperialism." 542 U.S. at 169. How would this Court describe an incursion that jeopardizes another country's peace?

Importantly, this Court in *Hoffmann* premised its concerns for the sovereignty of the subject foreign nations on the effect of claims on prospective, not accomplished, grants of amnesty by those nations. " [A] decision permitting independently injured foreign plaintiffs to pursue [these claims in a U.S. court]... would undermine foreign nations' own

antitrust enforcement policies diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty... " 542 U.S. at 169.

The grant of amnesty to Petitioner and all combatants of the civil war by El Salvador's Amnesty Law is not a possibility, it is already a fact. The disincentive referenced in *Hoffmann* to seeking amnesty through cooperation with authorities is certainly no more corrosive of a sovereign's interests than is impugning a statute that laid to rest a bloody civil war.

It bears emphasis that *Hoffmann's* refusal to contravene a foreign amnesty, even a prospective one, mentions no requirement that the amnesty be formulated with the intent of affecting controversies or cases in other countries.

II. The Trial Court's Exercise of Jurisdiction in this Case Does Not Survive Scrutiny Under *Sosa*.

a. The Supreme Court's Latest Ruling on the Alien Tort Claims Act Calls for a Dismissal of the Instant Claims Pursuant to an Analysis of Prudential Considerations.

Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004) calls for "great caution" in applying the Alien Tort Claims Act. In overturning an award under the statute, the Supreme Court opined that ATCA was meant to apply only to a "narrow set of violations of

the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs... " *Id.* at 715. Courts should consider ATCA claims, mindful "that the door is still ajar [for such claims, but is] subject to vigilant doorkeeping." *Id.* at 729.

The trial court can hardly be said to have exercised caution in allowing the instant claims when it overbore the statute of a sovereign power after having refused to hear expert testimony on the effect of the Amnesty Law and having identified no basis for its conclusion that the statute "does not prohibit legal claims brought outside of El Salvador." App. 36a.

The trial court does not justify its derogation of the Amnesty Law by concluding that both ATCA and TVPA evince a clear congressional intent to "provide a means for victims of the law of nations to seek redress." App. 92a. Neither ATCA nor TVPA specifically mentions or contemplates the circumstance of a countervailing foreign law of amnesty. To the contrary, the legislative history of TVPA indicates that the statute shall not be applied so long as a defendant enjoys "immunity," which presumably would flow from a foreign amnesty.

By the trial court's and, presumably, the appellate court's logic, every foreign law at variance with an American law would simply constitute a nullity in any American court. Choice of law, however, is not nearly so simplistic. *Sosa* describes a "flexible balancing analysis to inform choice of law" and quotes from the *Restatement (Second) of Conflict*

of Laws, Sec. 146, a default rule for tort cases that "'in an action for personal injury, the local law of the state where the injury occurs determines the rights and liabilities of the parties, unless ... some other state has a more significant relationship . . . to the occurrence and the parties.'" 542 U.S. at 709.

The United States can hardly be said to have a more significant relationship to the allegations at bar than does El Salvador. As the locus of the alleged conduct, the locus of the effects of that conduct, the place of residence of most of the litigants, and the progenitor of a justified expectation of amnesty, El Salvador's interest is clearly the greater.

Further, the lower court neglects *Sosa's* requirement that courts considering ATCA cases exercise "a policy of case specific deference to the political branches." 542 U.S. at n.21. ATCA cases (and TVPA cases) implicate foreign policy, an area committed to the "executive and the legislative – 'the political' departments of the government.'" *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). Courts are specifically discouraged from intruding into foreign policy matters already subject to undertakings by either of the political branches. *See Mujica v. Occidental*, 381 F. Supp. 2d 1164, 1195 (C.D. Cal. 2005); *Corrie v. Caterpillar*, 403 F. Supp. 2d 1019, 1031 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007); *Iwanowa v. Ford*, 67 F. Supp. 2d 424, 485 (D.N.J. 1999), in all of which, courts declined to adjudicate "political questions" implicating foreign policy.

The executive branch of the United States Government played a "distinctly critical role" and invested $270 million per annum in the negotiation of the peace accords and the Amnesty Law that constitutes their bulwark.

Remarkably, *Sosa* proffers circumstances precisely similar to those at bar as illustrative of the very cases auguring judicial restraint in accepting ATCA claims. *Sosa* offers as illustration *In re: South African Apartheid Litigation*, 238 F. Supp. 2d 1379 (JPML 2002), which entails ATCA claims by South Africans against foreign corporations that allegedly abetted the apartheid regime. The government of South Africa had cautioned that adjudication could interfere with South Africa's "'reconciliation, reconstruction, reparation and goodwill'" in the wake of its transition from apartheid. 542 U.S. at n.21 (quoting Penell Mpapa, South African Minister of Justice). The impact of the claims at bar on the interests of El Salvador should be no less worthy of consideration.[6]

Finally, *Sosa* warns courts to consider the "practical consequences" of making a claim under international law available to a federal litigant. 542 U.S. at 732-33.

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[6] *Khulumani v. Barclay Natl. Bank*, 504 F.3d 254 (2d Cir. 2007) reverses the district court's dismissal of the claims subject of the *South African Litigation* case. However, *Khulumani* "expresses no view" on the applicability of the prudential considerations, having remanded the case primarily because the appellate court disagreed with the lower court's rejection of aider and abettor liability under ATCA. *Id.* at 263-64, n.12.

b. The Practical Consequences of Exercising Jurisdiction Are Untenable.

Respondents have sought, and received, equitable tolling of the statutes of limitations that would ordinarily bar their claims. Equitable concerns, however, augur consideration of the plight of all those victimized in El Salvador's civil war. The Report of the United Nations Truth Commission on El Salvador, UN Security Council, Annex, S/25500, April 1, 1993 ("Report"), admitted into evidence at trial, JA Vol. II 986, recounts some of the conduct of the sundry combatant groups united under the FMLN.

The FMLN assassinated nine mayors, JA, Vol. IV 1009-12; as well as Herbert Anaya Sanabria, Commissioner of Human Rights of El Salvador, JA, Vol. IV 1020; Napoleon Romero Garcia, disaffected leader of a component of the FMLN, JA, Vol. IV 1025; Francisco Peccorini Lettona, university professor and newspaper contributor, JA, Vol. IV 1026; Jose Roberto Garcia Alvarado, Attorney General of El Salvador, JA, Vol. IV 1027; Francisco Jose Guerrero, former Chief Justice of the Salvadoran Supreme Court, JA, Vol. IV 1027; and Jose Apolinar Martinez, Justice of the Peace, JA, Vol. IV 1036. What of the Salvadorans who suffered at the hands of the FMLN and see their country's Amnesty Law unilaterally denigrated in an American court?

The Sixth Circuit's decision corrodes the spirit of reconciliation embodied in the Amnesty Law and pivotal to the success of El Salvador's post-war democracy. The Report reflects that El Salvador had previously implemented Law 805 of Unconditional Amnesty in 1987, JA, Vol. IV 871, but the war continued for over four more years thereafter. By what right does an American court require the people of El Salvador to assume the risk of devaluing the successor amnesty which has enjoyed such remarkable success?

Moreover, the detriment to flow from the decision to adjudicate Respondents' claims would extend beyond El Salvador. Relations between the United States and El Salvador would suffer as well as those of the United States with every other country that would perceive the blatant violation of El Salvador's sovereignty that is the lower courts' decision. Other amnesties, in existence or contemplated in areas of violent strife, would be undermined.

Finally, the Report also attributes to the FMLN the assassination of four unarmed and out of uniform United States Marine Embassy Guards (along with nine bystanders), JA, Vol. IV 1015, and the summary execution of United States Army Lieutenant Colonel David Pickett and Corporal Ernest Dawson as these last lay wounded and defenseless after their helicopter was shot down, JA, Vol. IV 1032. (The sentences of the two guerillas convicted of murdering Lt. Col. Pickett and Cpl. Dawson were vacated following passage of the

Amnesty Law. Case No. CPS02495.95, Sup. Ct. of El Sal., (Aug. 16, 1995), pp. 1-2.[7])

It bears noting that one of Respondents, Daniel Alvarado, was convicted in El Salvador of membership in a subversive organization during the civil war. (Department of State Cable, Ex. K. to Plaintiffs' Memorandum in Support of Motion for Summary Judgment, *Chavez v. Carranza* Docket No. 35). Appellee Erlinda Franco Revelo claims for the death of her husband, a member of the FDR, App. 58a, revealed as a partner of the FMLN until 1987. JA, Vol. IV 859, 863, 869.

This Court should consider the implications of adjudicating monetary claims on behalf of members of groups committed to killing American soldiers. Imagine a claim by a member of al Qaeda against former President George W. Bush for waterboarding. Imagine such a claim, or others similar, against American or allied commanders by any of the thousands aggrieved through the prosecution of our wars in Iraq and Afghanistan in a foreign court following an American cohort's lead.

CONCLUSION

El Salvador stands as an example of reconciliation to all the strife torn nations of the world. Factions that less than 20 years ago waged a bloody civil war against each other, today address

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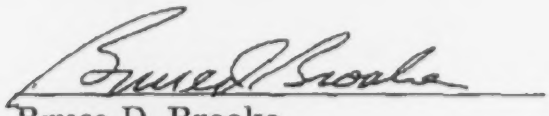
[7] *Available at* http://www.jurisprudencia.gob.sv/exploiis/.%5Cindice.asp?nBD=1&nDoc=22080&nItem=22082&nModo=1. Petitioner requests the Court take judicial notice of the decision pursuant to Fed. R. Evid. 201.

their differences through the institutions of a robust democracy. This remarkable transition was made possible by the Amnesty Law, a statute that signifies the will of all the combating factions and the people of El Salvador as a whole to reconcile and move forward as a nation rather than wallow in destructive recriminations. Respondents' claims undermine this reconciliation and the stability it has created.

El Salvador and the Salvadorans deserve the future that the Amnesty Law has made possible. It is not for the trial court, or any foreign court or entity, to jeopardize that future.

The decision to allow Respondents' claims violates the sovereignty of El Salvador and offends this Court's proscriptions on the action at bar. It should be reversed.

Respectfully submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ANA CHAVEZ,
CECILIA SANTOS,
JOSE CALDERON,
ERLINDA FRANCO, and
DANIEL ALVARADO,
Plaintiffs-Appellees,

No. 06-6234

v.

NICOLAS CARRANZA,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Tennessee at Memphis. No. 03-02932—Jon Phipps McCalla, Chief District Judge.

Argued: October 28, 2008

Decided and Filed: March 17, 2009

Before: SILER and McKEAGUE, Circuit Judges; LUDINGTON, District Judge.*

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*The Honorable Thomas L. Ludington, United States District Judge for the Eastern District of Michigan, sitting by designation.

COUNSEL

ARGUED: Robert M. Fargarson, Bruce D. Brooke, FARGARSON & BROOKE, Memphis, Tennessee, for Appellant. Matthew J. Sinback, BASS, BERRY & SIMS, Nashville, Tennessee, for Appellees. John C. Kiyonaga, ATTORNEY AT LAW, Alexandria, Virginia, for Amicus Curiae. **ON BRIEF:** Robert M. Fargarson, Bruce D. Brooke, FARGARSON & BROOKE, Memphis, Tennessee, for Appellant. David R. Esquivel, BASS, BERRY & SIMS, Nashville, Tennessee, for Appellees. John C. Kiyonaga, ATTORNEY AT LAW, Alexandria, Virginia, for Amicus Curiae.

OPINION

SILER, Circuit Judge. Defendant Nicolas Carranza appeals a jury verdict awarding compensatory and punitive damages to victims of torture, extrajudicial killing, and crimes against humanity in violation of the Alien Tort Statute (ATS), also called the Alien Tort Claims Act (ATCA) and the Torture Victims Protection Act (TVPA). Carranza argues that the district court abused its discretion by (1) holding that extraordinary circumstances justified equitable tolling of the statute of limitations, (2) not granting comity to the Salvadoran Amnesty Law, and (3) making various evidentiary rulings. He also contends that the district court erred in its instruction to the jury on command responsibility. We AFFIRM.

BACKGROUND

From the 1930s to the mid-1980s, El Salvador was governed by a military dictatorship. By the 1970s, opposition to the military's dominance increased. In response, militant organizations, such as the Salvadoran Security Forces, carried out systematic repression and human rights abuses against political dissenters. Civil unrest in the country resulted in a war which lasted from 1981 to 1992.

On January 1, 1992, the government of El Salvador and the Salvadoran guerilla forces signed a Peace Accord sponsored by the United Nations. In March 1993, the Salvadoran legislature adopted an amnesty law precluding criminal or civil liability for political or common crimes committed prior to January 1, 1992. In March 1994, the first national elections were held after the end of the civil war.

Carranza spent nearly thirty years as an officer in the armed forces of El Salvador. He served as El Salvador's Vice-Minister of Defense and Public Security from about October 1979 until January 1981. While in this position, he exercised operational control over the Salvadoran Security Forces–comprised of the National Guard, the National Police, and the Treasury Police. He also served as Director of the Treasury Police from June 1983 until May 1984. In 1984, he became a resident of the United States. He moved to Memphis, Tennessee, in 1986 and has been a naturalized citizen since 1991.

Plaintiff Cecilia Santos was tortured and assaulted while in custody at the National Police headquarters in San Salvador. On September 25, 1980, she was arrested and accused of planting a bomb. She was taken to the headquarters of the National Police where she was electrocuted, physically tortured with acid, and had an object forced into her vagina. She spent 32 months in confinement.

On September 11, 1980, members of the National Police entered Plaintiff Jose Calderon's home, forced him to the ground, and murdered Calderon's father.

Plaintiff Erlinda Franco's husband, Manuel, was abducted, tortured, and killed in 1980. He was a professor at the National University and was a prominent leader of the Democratic Revolutionary Front (FDR). On November 27, 1980, he attended a meeting of FDR leadership in San Salvador. While at the meeting, members of the Security Forces abducted Mr. Franco and five other leaders of the FDR. Later that day, the bodies of Mr. Franco and the other five men were found. Each had visible signs of torture.

On August 25, 1983, Plaintiff Daniel Alvarado was abducted by members of the Treasury Police while attending a soccer game. He was accused of killing Lt. Cmdr. Albert Schaufelberger, a United States military advisor in El Salvador. After four days of torture, Alvarado confessed to killing Schaufelberger. Carranza presided over the ensuing press conference. After being held in custody for

several weeks, Alvarado was questioned by members of the United States Navy and Federal Bureau of Investigation about the assassination of Schaufelberger. Alvarado was unable to provide accurate information about the assassination and subsequently explained that his confession was coerced through torture. After imprisonment for over two years, Alvarado fled to Sweden.

Plaintiffs filed suit against Carranza on December 10, 2003. Using a command responsibility theory, they claim that Carranza is liable for the acts of torture, extrajudicial killing, and crimes against humanity.

Carranza filed several motions during the course of the litigation, raising the same issues he argues on appeal: (1) the district court should not equitably toll the statute of limitations, and (2) the Salvadoran Amnesty Law bars plaintiffs' claims.

After trial, the jury found Carranza liable and awarded $500,000 in compensatory damages and $1 million in punitive damages to each plaintiff. However, the jury could not reach a unanimous verdict as to claims made by Plaintiff Ana Chavez. The district court declared a mistrial as to her claims, and those claims were later voluntarily dismissed.

DISCUSSION

I. Equitable Tolling of the Statute of Limitations

A.

Under the TVPA, plaintiffs have ten years from the date the cause of action arose to bring suit. 28 U.S.C. § 1350. However, the ATS does not specify a statute of limitations. When faced with this situation, courts should apply the limitations period provided by the local jurisdiction unless "a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 35 (1995) (quoting *DelCostello v. Teamsters*, 462 U.S. 151, 172 (1983)).

Like all courts that have decided this issue since the passage of the TVPA, we conclude that the ten-year limitations period applicable to claims under the TVPA likewise applies to claims made under the ATS. *See Jean v. Dorelien*, 431 F.3d 776, 778-79 (11th Cir. 2005); *Papa v. United States*, 281 F.3d 1004, 1012-13 (9th Cir. 2002); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 119 (D.D.C. 2003).

The TVPA and the ATS share a common purpose in protecting human rights internationally. The TVPA grants relief to victims of torture, 28

U.S.C. § 1350, and the ATS grants access to federal courts for aliens seeking redress from torts "committed in violation of the law of nations." 28 U.S.C. § 1350. Both statutes use civil suits as the mechanism to advance their shared purpose and both can be found in the same location within the United States Code. *See Arce v. Garcia*, 434 F.3d 1254, 1262, n.17 (11th Cir. 2006); *Papa*, 281 F.3d at 1012.

Likewise, the justifications for the application of the doctrine of equitable tolling under the TVPA apply equally to claims brought under the ATS. Congress provided explicit guidance regarding the application of equitable tolling under the TVPA. The TVPA "calls for consideration of all equitable tolling principles in calculating this [statute of limitations] period with a view towards giving justice to plaintiff's rights." S. REP. NO. 102-249, at 10 (1991).

We have identified five factors a district court should consider when determining whether to equitably toll the statute of limitations: (1) lack of notice of the filing requirement, (2) lack of constructive knowledge of the filing requirement, (3) diligence in pursuing one's rights, (4) absence of prejudice to the defendant, and (5) the plaintiff's reasonableness in remaining ignorant of the particular legal requirement. *See Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 561 (6th Cir. 2000). However, "the propriety of equitable tolling must necessarily be determined on a case-by-case basis." *Id.* (quoting *Truitt v. County of Wayne*, 148 F.3d 644, 648 (6th Cir. 1998)).

Again, Congress has provided explicit guidance as to when to apply the equitable tolling doctrine in TVPA cases:

> Illustrative, *but not exhaustive*, of the types of tolling principles which may be applicable include the following. The statute of limitations should be tolled during the time the defendant was absent from the United States or from any jurisdiction in which the same or similar action arising from the same facts may be maintained by the plaintiff, provided that the remedy in that jurisdiction is adequate and available. Excluded also from calculation of the statute of limitations would be the period when a defendant has immunity from suit. The statute of limitations should also be tolled for the period of time in which the plaintiff is imprisoned or otherwise incapacitated. It should also be tolled where the defendant has concealed his or her whereabouts or the plaintiff has been unable to discover the identity of the offender.

S. REP. NO. 102-249, at 10-11 (1991) (emphasis added).

Courts that have addressed equitable tolling in the context of claims brought under the TVPA and ATS have determined that the existence of extraordinary circumstances justifies application of

the equitable tolling doctrine. *See Arce*, 434 F.3d at 1259, 1262-63 (tolling the statute of limitations under the TVPA and ATS until the signing of the Peace Accord in 1992 because the fear of reprisals against plaintiffs' relatives orchestrated by people aligned with the defendants excused the plaintiffs' delay); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1155 (11th Cir. 2005) (tolling the statute of limitations under the TVPA and ATS "[u]ntil the first post-*junta* civilian president was elected in 1990" for claims brought against a Chilean military officer); *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996) (tolling the statute of limitations for TVPA and ATS claims against former Philippine dictator Ferdinand Marcos until the Marcos regime was overthrown); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1549 (N.D. Cal. 1987) (holding that the plaintiff raised an issue of fact as to whether the ATS statute of limitations should be tolled for claims against an Argentine military officer until a democratically-elected government was in place).

When the situation in a given country precludes the administration of justice, fairness may require equitable tolling. In such limited circumstances, where plaintiffs legitimately fear reprisals against themselves or family members from the regime in power, justice may require tolling. These circumstances, outside plaintiffs' control, make it impossible for plaintiffs to assert their TVPA and ATS claims in a timely manner. In such extraordinary circumstances, equitable tolling of TVPA and ATS claims is appropriate.

In sum, we conclude that the ten-year limitations period applicable to TVPA claims also governs claims under the ATS, equitable tolling principles apply, and the existence of extraordinary circumstances provides a justification for the application of the equitable tolling doctrine.

B.

We review a decision on the application of equitable tolling de novo where the facts underlying the equitable tolling are undisputed. *Cook v. Comm'r of Soc. Sec.*, 480 F.3d 432, 435 (6th Cir. 2007). When the facts are in dispute, we apply an abuse of discretion standard. *Id.* Here, Carranza disputes plaintiffs' contention that facts and circumstances in El Salvador justify equitable tolling. Accordingly, we review the district court's decision for an abuse of discretion.

Each of the acts for which Carranza was held liable occurred more than ten years before plaintiffs filed suit. However, the district court determined that the pervasive violence that consumed El Salvador until March 1994 (when El Salvador held its first national elections following the signing of the Peace Accord) justified equitable tolling of the ten-year statute of limitations. These findings of fact are supported by the record.

The evidence established that widespread human rights abuses were carried out by the Salvadoran military against civilians during the country's civil war and that plaintiffs feared reprisals against themselves or their family

members. Carranza held a position of power within the Salvadoran military regime.

In addition, the violence associated with the civil war continued after the signing of the Peace Accord in 1992 until at least March 1994, when the first national elections were held after the civil war. Plaintiffs submitted affidavits stating that even after they arrived in the United States, they were afraid that their families in El Salvador would be subject to repression or violence by the Salvadoran military. They also stated that they did not feel that it was safe for their families in El Salvador to bring suit until many years after the end of the civil war. Given this evidence, it was within the district court's discretion to toll the statute of limitations until March 1994.

Carranza argues that the district court abused its discretion in tolling the statute of limitations because plaintiffs did not introduce evidence at trial proving they feared reprisals for bringing this lawsuit, and the plaintiffs were not aware of their right to bring a legal action during the period in which they feared reprisals by the Salvadoran military. Carranza's arguments fail.

First, the decision to invoke equitable tolling is a question of law. *Rose v. Dole*, 945 F.2d 1331, 1334 (6th Cir. 1991). The district court addressed and decided the equitable tolling issue in denying Carranza's motions to dismiss and for summary judgment. As such, the issue had been resolved prior to trial and no additional proof was required.

Second, equitable tolling was justified by extraordinary circumstances outside of plaintiffs' control, which made it impossible for plaintiffs to assert their claims in a timely manner. Whether the plaintiffs knew they had an actionable claim under United States law does not change the fact that at least until March 1994, the circumstances in El Salvador were not sufficiently safe for plaintiffs to seek redress in court.

The district court appropriately considered the documentary evidence and witness declarations in addressing the issue of equitable tolling when it considered and denied Carranza's motions to dismiss and for summary judgment. The district court did not abuse its discretion in finding extraordinary circumstances existed justifying the equitable tolling of the ten-year statute of limitations.

II. Salvadoran Amnesty Law

The Salvadoran Amnesty Law was passed by the Salvadoran Legislature in order to provide amnesty to all those who participated in political or common crimes during the civil war in El Salvador before 1992. *See* Decreto Legislativo 486 de 3/22/93 Aprueba la Ley Sobre la Amnistía General para la Consolidación de la Paz [Legislative Decree 486 of 3/22/93 Approving the General Amnesty Law for Consolidation of the Peace], Diario Oficial, 23 de Marzo de 1993 (E.S.). The purpose of the Salvadoran Amnesty Law is "to reconcile and reunite the Salvadoran family by promulgating, and immediately implementing, legal provisions that protect the right of the entire Salvadoran population

to fully conduct its activities in harmony, and a climate of trust and respect for all social sectors."

Carranza claims that he is entitled to amnesty pursuant to the Salvadoran Amnesty Law.[1] He argues that the district court erred when it declined to apply the Salvadoran Amnesty Law to plaintiffs' claims. We review the district court's decision not to grant comity to the Salvadoran Amnesty Law for an abuse of discretion. *See, e.g., Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178 (2d Cir. 2006); *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 121-22 (3d Cir. 2002); *cf. Taveras v. Taveraz*, 477 F.3d 767, 783 (6th Cir. 2007) ("[T]he theory of comity can serve as a discretionary basis for a court to determine whether a foreign country court's judgment should be given preclusive effect.").

International comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another

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[1]It is not clear from the record whether Carranza is immune from suit under the Salvadoran Amnesty Law. Article 4 of the law sets forth a series of procedures for a person to gain amnesty. According to Article 4, an unindicted person or a person wishing to benefit from the amnesty must file a motion or appear before a trial judge and request a certificate of amnesty. It is unclear whether this process applies exclusively to criminal defendants or whether it is meant to apply to defendants in civil cases as well.

Nevertheless, there is no evidence in the record indicating that Carranza has a certificate of amnesty. In any event, neither party has raised this issue and it does not impact our analysis of the extraterritorial application of the Salvadoran Amnesty Law, nor does it effect the outcome of this case.

nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). In order for an issue of comity to arise, there must be an actual conflict between the domestic and foreign law. *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 798 (1993). There is no conflict for comity purposes "where a person subject to regulation by two states can comply with the laws of both." *Id.* at 799 (quoting RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 403 cmt. e (1987)).

There is no conflict between domestic and foreign law because the Salvadoran Amnesty Law cannot be interpreted to apply extraterritorially. A statute must not be interpreted as having extraterritorial effect without a clear indication that it was intended to apply outside the country enacting it. *BMW Stores, Inc. v. Peugeot Motors of Am., Inc.*, 860 F.2d 212, 215 n.1 (6th Cir. 1988). There is nothing in the Salvadoran Amnesty Law to suggest that it should apply or was intended to apply outside of El Salvador.

Moreover, compliance with both domestic law and the Salvadoran Amnesty Law is possible. Plaintiffs may be barred from filing suit in El Salvador, but they are not barred from filing suit in the United States. Likewise, if Carranza were living in El Salvador, he would likely be immune from suit. However, he is a citizen and resident of the United States and is therefore subject to civil liability for his violations of the ATS and TVPA. In addition, the Republic of El Salvador, as amicus, argues that this

case would be rejected if it were brought in El Salvador– further demonstrating that Salvadoran courts can apply the Salvadoran Amnesty Law domestically without undermining the jurisdiction of United States courts.

Carranza's reliance on *F. Hoffmann-LaRoche v. Empagran*, 542 U.S. 155 (2004), is misplaced. In *Empagran*, the Supreme Court interpreted an antitrust statute, the Foreign Trade Antitrust Improvements Act of 1982 (FTAI), which expressly places extraterritorial limits on the application of the Sherman Act. With some exceptions, the FTAI provides that the Sherman Act "shall not apply to conduct involving trade or commerce . . . with foreign nations." *Id.* at 158 (quoting 15 U.S.C. § 6a). In reaching its conclusion, the Supreme Court did not address the ATS or TVPA, nor did it discuss international comity. Therefore, *Empagran* is of little relevance to the law at issue in this case.

III. Evidence at Trial

A. The Truth Commission Report

Carranza contends that the district court abused its discretion in admitting the Truth Commission Report into evidence. Specifically, Carranza argues that the report is not timely and, therefore, is not trustworthy.

The Truth Commission Report was prepared by the Commission on the Truth for El Salvador, an entity established under the 1992 United Nations-sponsored peace agreements between the

Government of El Salvador and the Frente Farabundo Marti para la Liberación Nacional. The Truth Commission Report sets forth the factual findings that the Truth Commission discovered through its investigation of El Salvador– an investigation mandated by the peace agreements sponsored by the U.N. The district court admitted the Truth Commission Report into evidence under the Public Records and Reports exception to the hearsay rule.

Under the Public Records and Reports exception to the hearsay rule, reports of "public offices or agencies" setting forth "factual findings resulting from an investigation made pursuant to authority granted by law" are admissible "unless the sources of information or other circumstances indicate lack of trustworthiness." FED. R. EVID. 803 (8)(C). To determine whether a report is trustworthy, courts consider the following four factors: (1) the timeliness of the investigation upon which the report is based, (2) the special skill or experience of the investigators, (3) whether the agency held a hearing, and (4) possible motivational problems. *Bank of Lexington & Trust Co. v. Vining-Sparks Sec., Inc.*, 959 F.2d 606, 616-17 (6th Cir. 1992).

Carranza claims that the Report is not timely because the investigation on which it was based did not begin until at least eight years after Carranza's association with the El Salvador military was over, and ended seven years after he moved to the United States. However, the timeliness factor focuses on how much time passed between the events being investigated and the beginning of the investigation.

See id. at 617. Here, the Peace Accord was signed on January 1, 1992, and the Truth Commission began its investigation on July 13, 1992, seven months later. Therefore, the timeliness of the investigation suggests the Report is trustworthy.

Carranza also contends that the Truth Commission Report is untrustworthy because the commission did not hold a hearing. However, a formal hearing is not necessary when other indicia of trustworthiness are present. *Id.* Even though the Truth Commission did not conduct a formal hearing, it interviewed numerous witnesses, victims, and relatives associated with the events described in the Report. In addition, the Truth Commission reviewed thousands of complaints of acts of violence, examined documents, interviewed members of the military, and visited locations of acts of violence.

For the foregoing reasons, the district court did not abuse its discretion in admitting the Truth Commission Report into evidence.

B. Testimony of Ambassador White and Professor Karl

Carranza argues that the district court abused its discretion in allowing two of plaintiffs' expert witnesses, Robert White, former U.S. Ambassador to El Salvador, and Professor Terry Karl, the former Director of the Center of Latin American Studies at Stanford University, to testify. Carranza objects to several statements made by both experts as highly inflammatory and based on inadmissible hearsay.

Experts may base their testimony on inadmissible facts "of a type reasonably relied upon by experts in the particular field." FED. R. EVID. 703. Ambassador White's testimony was based on intelligence gathered by himself, his staff, and other government agents. Furthermore, Ambassador White was listed, without objection by Carranza, in the joint pretrial order as an expert witness. Professor Karl testified as to the levels of violence in El Salvador during the period of military control. Professor Karl relied upon interviews, commission reports (including the Truth Commission Report), documentary research, and field research to form her opinions. *See, e.g.*, *Katt v. City of New York*, 151 F. Supp. 2d 313, 356-57 (S.D.N.Y. 2001) (noting that interviews, commission reports, research articles, scholarly journals, books, and newspaper articles are the types of data reasonably relied upon by social science experts).

Carranza also contends that the district court improperly admitted testimony by Professor Karl. Carranza claims that Professor Karl should not have been permitted to testify about military procedures and command responsibility because she has never served in a military organization and she was never identified as a military expert.

Professor Karl's report contains a lengthy discussion of her opinions about Salvadoran military structure and Carranza's command responsibility. In her report, Professor Karl discusses her credentials as an expert in the politics of Latin America including: the military strategies of both the Salvadoran military and security forces and the

armed opposition, the command structure of the Salvadoran military, the corruption of the Salvadoran military and security forces, and the practice of death squads.

The district court did not abuse its discretion in allowing the jury to determine the weight to be given to the testimony of Professor Karl and Ambassador White.

C. Embassy Cables

Carranza contends that Trial Exhibit 6 was improperly admitted into evidence because its purported author has disavowed authorship.

Trial Exhibit 6 is a United States government document describing a conversation in 1980 between a U.S. official and Salvadoran military officers in which Carranza "supported [a] line of thinking" that assassinations of political opponents should be accomplished whenever possible. Ambassador White testified that the author of this document was Colonel Brian Bosch, a U.S. military representative at the U.S. Embassy in San Salvador. Ambassador White used the contents of this document to support his testimony regarding the Salvadoran military's responsibility for the six FDR murders, the basis for Franco's claim. In a post-trial affidavit, Colonel Bosch claims he is not the author of this cable and that he has no personal knowledge of the statements attributed to Carranza.

Trial Exhibit 6 was admissible under Rule 803(6) of the Federal Rules of Evidence. Through the

testimony of Ambassador White, the plaintiffs established a foundation that certain cables, including Trial Exhibit 6, were transmitted from United States governmental agents describing or recording events made at or near the time the acts took place by someone with personal knowledge of the acts. Ambassador White also testified that the cables were kept in the course of regularly conducted business of the United States governmental agency, and it was the regular practice of the agencies to make those records. Colonel Bosch's affidavit disputes that he is the author of Trial Exhibit 6 but it does not dispute its authenticity.

However, even if Trial Exhibit 6 was improperly admitted, it did not unfairly prejudice Carranza. The gravamen of the cable is the knowledge and approval of the assassination of the FDR leaders by members of the Salvadoran military, including Carranza. This was corroborated by several witnesses and exhibits at trial, including the testimony of Ambassador White and Professor Karl, as well as the Truth Commission Report and several other cables.

Carranza also argues that the copy of Trial Exhibit 6 he was provided with during discovery is illegible and highly redacted. Therefore, Carranza characterizes the cleaner copy of Trial Exhibit 6, provided to the jury by plaintiffs, as "previously undisclosed." This contention is without merit and is belied by the fact that plaintiffs provided Carranza with a copy of Trial Exhibit 6 during his deposition and Carranza was asked a number of questions about it.

D. Photographs

Carranza argues that the district court abused its discretion when it admitted into evidence photographs depicting dead bodies and victims of military atrocities. Carranza contends that the photographs were unfairly prejudicial.

The photographs are relevant (1) to prove crimes against humanity and (2) to establish liability under a theory of command responsibility. They are relevant proof that the Salvadoran military was engaged in a systemic attack against civilians. The photographs also demonstrate that Carranza had notice of the human rights violations committed by his subordinates, as required for liability under a theory of command responsibility.

Although it is likely that the photographs had a substantial impact on the jury, the district court did not abuse its discretion in determining that the photographs' probative value was not substantially outweighed by the danger of unfair prejudice.

E. Exclusion of Carranza's Expert

Carranza contends that the district court abused its discretion in excluding the testimony of his expert witness, Dr. David Escobar Galindo. Dr. Galindo's testimony would have centered on the purposes behind the Salvadoran Amnesty Law as well as its application to plaintiff's claims against Carranza. As the district court properly declined to grant comity to the Salvadoran Amnesty Law, testimony regarding how the Salvadoran Amnesty

Law would apply to Carranza is not relevant and, therefore, not helpful.

An expert opinion on a question of law is inadmissible. *Berry v. City of Detroit*, 25 F.3d 1342, 1353-54 (6th Cir. 1994). Dr. Galindo's testimony would have addressed whether the Salvadoran Amnesty Law prohibits U.S. courts from exercising jurisdiction over plaintiffs' claims. This is a legal question and not one which should be presented to a jury. Therefore, the district court did not abuse its discretion in excluding Dr. Galindo's testimony.

Carranza also argues that the district court erred in not allowing Dr. Galindo to offer factual information of circumstances in El Salvador. However, Dr. Galindo was not proposed as a fact witness until four days prior to trial. Nevertheless, plaintiffs agreed to stipulate to those facts that were disclosed in Dr. Galindo's expert report. Carranza did not introduce those facts.

IV. Jury Instructions on the Law of Command Responsibility

Finally, Carranza argues that the district court erred in its instructions to the jury on the law of command responsibility. Specifically, he contends that the jury should have been instructed on proximate cause.

Three elements must be established for command responsibility to apply: (1) a superior-subordinate relationship between the defendant/military commander and the person or

persons who committed human rights abuses; (2) the defendant/military commander knew, or should have known, in light of the circumstances at the time, that subordinates had committed, were committing, or were about to commit human rights abuses; and (3) the defendant/military commander failed to take all necessary and reasonable measures to prevent human rights abuses and punish human rights abusers. *See Ford v. Garcia*, 289 F.3d 1283, 1288 (11th Cir. 2002).

The law of command responsibility does not require proof that a commander's behavior proximately caused the victim's injuries. *See Hilao*, 103 F.3d at 776-79 (proximate cause is not an element of command responsibility). This conclusion is in accord with the legislative history of the TVPA:

> [A] higher official need not have personally performed or ordered the abuses in order to be held liable. Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts - anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.

S. REP. NO. 102-249, at 9 (1991) (footnote omitted). Any question as to whether an injury was caused by a commander's act or omission can be resolved by a finding of liability under the elements of command responsibility.

Accordingly, plaintiffs were not required to submit proof of proximate cause in order to succeed on their claims under the law of command responsibility, and the district court was not required to instruct the jury on this issue.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

ANA PATRICIA CHAVEZ,	)	
CECILIA SANTOS,	)	
JOSE FRANCISCO CALDERON,	)	
ERLINDA REVELO, and	)	
DANIEL ALVARADO,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 03-2932
	)	MI/P
NICOLAS CARRANZA,	)	
	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL, AND/OR REMITTITUR

Before the Court is Defendant's Motion for Judgment Notwithstanding the Verdict, New Trial, and/or Remittitur, filed February 1, 2006. Plaintiffs Santos, Calderon, Revelo, and Alvarado responded in opposition on February 17, 2006, and Defendant filed a reply on March 15, 2006. For the reasons set forth below, Defendant's motion is DENIED.

I. Background and Procedural History

Plaintiffs,[1] who are or were at all pertinent times citizens of El Salvador, filed the instant action against Defendant on December 10, 2003. Plaintiffs' claims arise under the Torture Victims Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (enacted March 12, 1992)(codified as Note to 28 U.S.C. § 1350), and the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350. Plaintiffs allege that Defendant, a former military leader in El Salvador in the early 1980s, exercised command responsibility over Salvadoran security forces that carried out widespread human rights abuses against the civilian population during the country's civil war. Plaintiffs claim that, as a member of the high command of the Salvadoran military and, later, as director of the treasury police, Defendant bears command responsibility for the torture, extrajudicial killing, and crimes against humanity that Plaintiffs and their family members suffered at the hands of the Salvadoran military and police forces. Defendant, who has resided in the United States since 1984 and is currently a resident of Memphis, Tennessee, maintains that he did not have effective control over the conduct of his subordinates and that he should not be held liable for their acts.

On September 30, 2004, the Court denied Defendant's motion to dismiss and renewed motion to dismiss, finding that the doctrine of equitable

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[1] Ana Patricia Chavez was also an original plaintiff in this case. As explained below, Chavez voluntarily dismissed her suit after the jury was unable to reach a verdict as to her claims.

tolling applied to Plaintiffs' claims and that the ten-year statute of limitations should be tolled until March of 1994, when the first post-war elections were held. The Court also denied Defendant's motion to dismiss based on Plaintiffs' failure to exhaust their legal remedies in El Salvador and Defendant's motion to dismiss based on subject matter jurisdiction. (Docket No. 28.)

On October 18, 2005, the Court denied Defendant's motion for judgment on the pleadings, or in the alternative, for summary judgment. The Court again denied Defendant's statute of limitations argument. It also rejected Defendant's contention that the broad amnesty law passed by the Salvadoran Legislature in 1993 is entitled to full faith and credit and that, under the doctrine of comity, the Court should decline jurisdiction in this case. (Docket No. 97.)

Prior to trial, Plaintiffs moved this Court to find that no issue of material fact existed as to whether Plaintiffs and/or their family members had been subjected to torture and/or extrajudicial killings—the predicate acts for which Plaintiffs claimed that Defendant was liable under the doctrine of command responsibility. Plaintiffs did not seek summary judgment on the issue of Defendant's liability under the law of command responsibility or on their claims for crimes against humanity. On October 26, 2005, the Court granted summary judgment in favor of Plaintiff Santos as to her claim of torture under the TVPA, Plaintiff Calderon as to his claim of torture and extrajudicial killing under the TVPA, Plaintiff Revelo as to her claim of

extrajudicial killing under the ATCA and the TVPA, and Plaintiff Alvarado as to his claim of torture under the ATCA and the TVPA. The Court denied Plaintiff Chavez's motion for summary judgment on her claims of torture and extrajudicial killing under the ATCA and TVPA, finding that an issue of material fact existed as to whether government actors were involved in the alleged acts. (Docket No. 108.)

II. Trial

The trial of this case commenced on October 31, 2005. Each Plaintiff testified at trial, and Plaintiffs called five other witnesses to testify on their behalf. These witnesses included Robert White, the former United States ambassador to El Salvador, who testified as a fact witness and as an expert on Salvadoran military and political structure. Plaintiffs also called Professor Terry Lynn Karl, an expert in the political history of El Salvador and the role of the military within the Salvadoran government, and Professor Jose Luis Garcia, a retired colonel in the Argentinian military who testified as an expert on the Salvadoran military structure and the obligations of a military commander.

At the close of Plaintiffs' case, Defendant moved for judgment as a matter of law on the ground that the doctrine of equitable tolling is not applicable in Plaintiffs' case, and, therefore, that their action is time-barred. The Court denied Defendant's motion.

Defendant's case-in-chief consisted of the testimony of five witnesses, including Defendant. Plaintiffs then recalled Professor Karl as a rebuttal witness. At the close of all evidence, Defendant renewed his motion for judgment as a matter of law on the basis of his statute of limitations argument and on all other grounds previously raised in his pretrial motions. The Court denied Defendant's renewed motion.

On November 18, 2005, the jury rendered its verdict in favor of Plaintiffs Santos, Calderon, Revelo, and Alvarado. Specifically, the jury found that Defendant was liable under the law of command responsibility for (1) the torture of Plaintiff Santos; (2) the extrajudicial killing of Plaintiff Calderon's father and the torture of Plaintiff Calderon; (3) the extrajudicial killing of Plaintiff's Revelo's husband and crimes against humanity; and (4) the torture of Plaintiff Alvarado and crimes against humanity. The jury also found, as to these Plaintiffs, that Defendant's conduct was intentional, malicious, wanton, or reckless. The jury awarded Plaintiffs Santos, Calderon, Revelo, and Alvarado $500,000 each in compensatory damages. The jury was unable to reach a verdict as to the claims of Plaintiff Chavez. Following brief arguments from both sides on punitive damages, the jury resumed deliberations and subsequently awarded Plaintiffs Santos, Calderon, Revelo, and Alvarado $1,000,000 each in punitive damages.

Following the trial, Plaintiff Chavez voluntarily dismissed her claims, and a final judgment was entered on January 18, 2006.

Defendant subsequently filed the instant motion for judgment notwithstanding the verdict, a new trial, and/or remittitur.

III. Renewed Motion for Judgment as a Matter of Law

A. Standard of Review

Defendant moves for judgment notwithstanding the verdict under Federal Rule of Civil Procedure 50. Rule 50 was amended in 1991, and a motion for judgment nothwithstanding the verdict is now referred to as a renewed motion for judgment as a matter of law. Greene v. B.F. Goodrich Avionics Sys., Inc., 409 F.3d 784, 786 n.1 (6th Cir. 2005). Accordingly, the Court will refer to Defendant's Rule 50 motion as a renewed motion for judgment as a matter of law.

Rule 50(b) provides that if the court does not grant a motion for judgment as a matter of law made at the close of all evidence, "[t]he movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment . . . ." Fed. R. Civ. P. 50(b). A court may grant a motion for judgment as a matter of law "only if in viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion, in favor of the moving party." Gray v. Toshiba Am. Consumer Prods., Inc., 263 F.3d 595, 598 (6th Cir. 2001). A Rule 50(b) motion should only be granted "if a complete absence of proof exists on a material issue

in the action, or if no disputed issue of fact exists on which reasonable minds could differ." LaPerriere v. Int'l Union UAW, 348 F.3d 127, 132 (6th Cir. 2003).

B. Analysis

1. Equitable Tolling

In the instant motion, Defendant renews his motion to dismiss Plaintiffs' action as untimely. The Court has examined and rejected Defendant's statute of limitations defense twice prior to trial and on Defendant's motion for judgment as a matter of law during trial. (See Order Denying Def.'s Mots. Dismiss Compl., Sept. 30, 2004 (Docket No. 28); Order Denying Def.'s Mot. J. Pleadings and Summ. J., Oct. 5, 2005 (Docket No. 97); Tr. 1211-21, 1622-23.) Specifically, the Court found that the ten-year statute of limitations period applicable to actions under the TVPA and ATCA should be tolled, under the doctrine of equitable tolling, until March of 1994, when the first post-war elections were held in El Salvador.

As previously noted in this Court's earlier rulings, other courts have held that the doctrine of equitable tolling should apply to actions brought under the TVPA or ATCA "where extraordinary circumstances outside plaintiff's control make it impossible for plaintiff to timely assert his claim." Forti v. Suarez-Mason, 672 F. Supp. 1531, 1549 (N.D. Cal. 1987); see also Hilao v. Estate of Marcos, 103 F.3d 767, 773 (9th Cir. 1996). The Sixth Circuit has not addressed the applicability of the doctrine of

equitable tolling in TVPA or ATCA actions, but has identified several factors to consider when determining whether to apply equitable tolling. Graham-Humphreys v. Memphis Brooks Museum of Art, Inc., 209 F.3d 552, 561 (6th Cir. 2000)(including lack of notice or constructive knowledge of the filing requirement and "the plaintiff's reasonableness in remaining ignorant of the particular legal requirement"). The specific considerations identified by the Sixth Circuit are not the only relevant considerations, however, as "[t]he propriety of equitable tolling must necessarily be determined on a case-by-case basis." Id. (quoting Truitt v. County of Wayne, 148 F.3d 644, 648 (6th Cir. 1998)).

In applying the doctrine of equitable tolling to the facts of Plaintiffs' case, the Court found that the widespread human rights abuses carried out by the Salvadoran military against civilians during the country's civil war and Plaintiffs' fear of reprisal against themselves or their family members in El Salvador constitute "extraordinary circumstances" sufficient to toll the statute of limitations. (Order Denying Def.'s Mots. Dismiss Compl. 6-8.) Further, the Court found that since the violence associated with the civil war continued after the signing of the negotiated peace agreements in 1992, the statute of limitations should be tolled until March of 1994, when the first national elections were held after the war. (Id. at 8-10.)

Contrary to Defendant's assertions in the instant motion, the evidence at trial did not undermine the Court's determination that the

statute of limitations should be tolled in this case. According to Defendant, Plaintiffs' fear of reprisal should not serve as a basis to toll the statute of limitations because Plaintiffs testified at trial that "they did not know they could file a lawsuit until contacted by lawyers from the Center for Justice and Accountability, who solicited each of them to pursue claims against Nicolas Carranza specifically." (Mem. Support Def.'s Mot. 4.) This is not a fair characterization of Plaintiffs' testimony. Erlinda Franco was the only Plaintiff who testified about being contacted by an attorney regarding the possibility of bringing a lawsuit in the United States. (Tr. 495.) Moreover, the fact that one or even all of the Plaintiffs might have been unaware that they could pursue a legal claim against Defendant in the United States until 2002 or 2003, as some Plaintiffs testified, is not relevant to the equitable tolling determination. Plaintiffs' awareness of their legal rights has no bearing on whether, until at least March of 1994, the circumstances in El Salvador were too volatile and dangerous to file suit against Defendant.

Instead, the testimony at trial served only to bolster Plaintiffs' earlier assertions to this Court that they believed that it was too dangerous to pursue legal action at any time prior to March of 1994. As the Court explained when it denied Defendant's motion at trial, Plaintiffs' testimony made very apparent the apprehension and fear that each had experienced as a result of their ordeals. (Tr. 1217-20.) Plaintiffs' testimony served to strengthen,

not undermine, the "extraordinary circumstances" justifying the tolling of the statute of limitations in this case.

Defendant also contends that it was improper for the Court to rely upon affidavits submitted by Plaintiffs in pretrial filings to deny his motion for judgment as a matter of law at trial.[2] According to Defendant, the Court's reliance was in error because Defendant did not have the opportunity to cross-examine Plaintiffs about their statements. Defendant also argues that Plaintiffs failed to present evidence at trial to support the equitable tolling of the statute of limitations. (Def.'s Mot. ¶ 4.)

These arguments fail for several reasons. First, Defendant did have an opportunity to cross-examine Plaintiffs about their prior statements, as every Plaintiff testified at trial, and Defendant cross-examined all of them. Second, Plaintiffs were not required to present evidence at trial to support their argument for equitable tolling. Equitable tolling is a question of law for the court to decide. Hilao v. Estate of Marcos, 103 F.3d 767, 779 (9th Cir. 1996);

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[2] The affidavits were submitted in opposition to Defendant's motion for judgment on the pleadings or for summary judgment. Plaintiffs Chavez, Santos, and Calderon submitted separate affidavits in which they stated that even after they came to the United States, they were afraid that their family in El Salvador would be subject to repression or violence by the Salvadran military. They also stated that they did not feel that it was safe for their families in El Salvador to bring suit until many years after the end of the civil war. (Pls.' Mem. Opp. Def.'s Mot. J. On Pleadings or Summ. J., Exs. 2, 3, 4.)

see also Gumbus v. United Food & Commercial Workers Int'l Union, 1995 WL 5935, at *3 (6th Cir. Jan. 6, 1995). Moreover, this issue had been ruled upon by the Court prior to trial; it was not an unresolved issue on which Plaintiffs needed to present proof. Nevertheless, Plaintiffs did present evidence—through the testimony of Plaintiffs and Professor Terry Lynn Karl—that supported the Court's finding of extraordinary circumstances.

Finally, the Court based its ruling on Defendant's renewed motion on the record as a whole—not merely on Plaintiffs' pretrial affidavits. (See Tr. 1211-21.) The Court noted that "the information that was submitted at the time of the court's ruling was more than sufficient to satisfy the court that equitable tolling was appropriate in this case" and went on to explain that Plaintiffs' testimony bolstered this conclusion and "strongly supports the determination of tolling in this case . . . ." (Id. at 1215, 1220.) In sum, both of Defendant's arguments in support of his statute of limitations defense are without merit, and Defendant's renewed motion for judgment as a matter of law is DENIED.

2. Comity

Defendant also argues that judgment as a matter of law is warranted on the basis that Plaintiffs' claims are barred under El Salvador's amnesty law. This law was passed by the Salvadoran legislature at the conclusion of the country's civil war in order to provide broad amnesty to all those who participated in political or common crimes in the country before 1992. According to Defendant, by

denying his motion for judgment as a matter of law on this basis at trial, the Court improperly "refused to grant full faith and credit to the sovereignty of El Salvador and grant immunity to Defendant." (Def.'s Mot. ¶ 2.)

The Court examined and rejected Defendant's argument prior to trial. (Order Denying Def.'s Mot. J. Pleadings and Summ. J., Oct. 5, 2005 (Docket No. 97)). In the instant motion, Defendant acknowledges the Court's prior ruling but fails to explain why it was erroneous. Defendant simply maintains that the Court "has rejected essentially the sovereign law of El Salvador and refused to grant full faith and credit to a hemispheric neighbor and an Amnesty Agreement and Treaty enacted into law in El Salvador." (Def.'s Reply 5.)

As this Court has previously noted, in order for the issue of comity to arise, there must be an actual conflict between domestic and foreign law. Hartford Fire Ins. Co. v. Cal., 509 U.S. 764, 798 (1993). Where "a person subject to regulation by two states can comply with the laws of both[,]" there is no conflict for comity purposes. Id. at 799. In this case, as the Court has previously explained, there is no conflict between domestic and foreign law because El Salvador's amnesty law does not prohibit legal claims brought outside of El Salvador. Therefore, contrary to Defendant's argument, allowing Plaintiffs' claims to proceed does not "ignore[ ] and nullif[y] a legitimate law of a sovereign hemispheric neighbor." (Def.'s Reply 5.) Defendant's renewed

motion for judgment as a matter of law on this ground is DENIED.[3]

IV. Motion for a New Trial

A. Standard of Review

Federal Rule of Civil Procedure 59(a) provides that a new trial may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States ...." Fed. R. Civ. P. 59(a). The authority to grant a new trial under Rule 59 rests within the discretion of the trial court. Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980). "[A] new trial is warranted when a jury has reached a seriously erroneous result . . . ." Strickland v. Owens Corning, 142 F.3d 353, 357 (6th Cir. 1998). A "seriously erroneous result" is evidenced by: "(1) the verdict being against the weight of the evidence; (2) the damages being excessive; or (3) the trial being unfair to the moving party in some fashion, i.e., the proceedings being influenced by prejudice or bias."

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[3] In a related argument, Defendant contends that it was error for the Court to grant Plaintiffs' motion in limine to exclude the testimony of Defendant's proposed expert witness, Dr. David Escobar Galindo. According to Defendant, Dr. Galindo was prepared to testify that the instant action violates the sovereign law of El Salvador and circumvents the purpose of the Peace Accord and Amnesty Agreement. This testimony was properly excluded because it would not have assisted the trier of fact "to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Whether the Salvadoran amnesty law should be afforded full faith and credit or otherwise operates to bar Plaintiffs' suit is a legal conclusion, and one that an expert may not draw. See Berry v. City of Detroit, 25 F.3d 1342, 1353-54 (6th Cir. 1994).

Holmes v. City of Massillon, 78 F.3d 1041, 1045-46 (6th Cir. 1996). Further, a motion for a new trial will not be granted unless the moving party has suffered prejudice. Tompkin v. Philip Morris USA, Inc., 362 F.3d 882, 891 (6th Cir. 2004)("Even if a mistake has been made regarding the admission or exclusion of evidence, a new trial will not be granted unless the evidence would have caused a different outcome at trial.")(quotation omitted). The burden of demonstrating harmful prejudice is on the party moving for a new trial. Id. (quotation omitted).

B. Analysis

1. Hearsay

Defendant first argues that several trial exhibits contain hearsay statements and should not have been admitted into evidence. Specifically, Defendant objects to the admission of the United Nations Truth Commission Report (Exhibit 28), telegraph cables from the United States Embassy in El Salvador (Exhibits 6, 37, 40, and 41), and an intelligence report, dated December 1980, that was authenticated by former Ambassador Robert White (Exhibit 6). Defendant fails to advance any argument or explanation for why the Court's rulings on the admissibility of the United Nations Truth Commission Report or embassy cables were erroneous. Therefore, the Court will not revisit these rulings.

Defendant does elaborate on his objection to the admissibility of Exhibit 6, an intelligence report that White testified was prepared by Colonel Brian

Bosch for the military intelligence bureau at the Pentagon. The report summarizes the reaction of Salvadoran military officers to the assassinations in 1980 of six leaders of a pro-democracy political party—the Frente Democrático Revolucionario ("FDR")—including the husband of Plaintiff Revelo. The report states, in pertinent part:

> Most [Salvadoran] military officers were highly pleased with the assassination of the six FDR leaders. These officers believe that other leaders and members of the FDR should be eliminated in a similar fashion wherever possible. These feelings were expressed by several middle-level army officers on 28 November 1980 in the presence of Col. Jose Garcia Merino, Minister of Defense, and Nicolas Carranza, Sub-Minister of Defense, and both Garcia and Carranza indicated that they supported this line of thinking. From the comments of all those present during this conversation, it was clear that Garcia, Carranza and the other officers present accepted as a fact that the military services were responsible for the assassination of the six FDR leaders.

(Ex. 6 ¶ 7.) Defendant contends that Exhibit 6 was not authored by Colonel Bosch, as Ambassador White testified, and that the statements in the report are inconsistent with Colonel Bosch's current recollection of events. Defendant submits the

affidavit of Colonel Bosch, dated November 25, 2005, in support of this argument. In his affidavit, Colonel Bosch, who is now retired, states that he served as the Defense and Army Attaché at the United States Embassy in San Salvador, El Salvador, from 1980 through 1981. (Bosch Aff. ¶ 2.) He states that he has reviewed Exhibit 6, and he is "absolutely positive that [he] did not prepare this document" because it is not consistent with his writing style or the form of document that he would have prepared while serving as military attaché. (Id. at ¶ 5.) Bosch goes on to state that the substance of the report "is completely contrary to my recollection of the facts and circumstances surrounding the events of the kidnapping and killing of the six (6) FDR members in El Salvador" because "[a]t no time did I observe or hear any expression by any of El Salvador's military officials that exhibited or expressed condoning or approval of the kidnapping and killing of the FDR leaders." (Id. at ¶ 6.)

As Plaintiffs correctly note, the fact that Colonel Bosch came forward after the trial to contradict Ambassador White's testimony as to the authorship of the report does not mean that it was improperly admitted into evidence under one of the Court's three alternative grounds—namely, Federal Rule of Evidence 803(6), as a record of regularly conducted activity, Rule 803(8), a public record, or Rule 803(16), as an ancient document. (Tr. 301-06, 357.) Moreover, even if the document was improperly admitted, its admission did not result in any prejudice to Defendant. The substance of the report—that members of the Salvadoran officer

corps, including Defendant, knew about and supported the assassination of the six FDR leaders—was corroborated by Ambassador White's testimony as well as several trial exhibits. (See Exhs. 5, 7, 28, and 50.) As set forth above, "[e]ven if a mistake has been made regarding the admission or exclusion of evidence, a new trial will not be granted unless the evidence would have caused a different outcome at trial." Tompkin, 362 F.3d at 891. The admission of Exhibit 6, even if in error, does not necessitate a new trial.[4]

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[4] Defendant's suggestion that Plaintiffs' witnesses falsely testified or that Plaintiffs' counsel elicited false testimony must be rejected. As set forth in the declaration of one of Plaintiffs' attorneys, David R. Esquivel, Colonel Bosch represented to Mr. Esquivel prior to trial that he was not the author of Trial Exhibit 6 and stated that the content of the report was not consistent with his personal opinion of Defendant. (Esquivel Decl. ¶ 11.) However, Colonel Bosch did not question the document's authenticity, and he made other statements that caused Mr. Esquivel to question his credibility. (Id. at ¶¶ 10-11.) Further, Plaintiffs' counsel was also aware that Ambassador White had previously identified Colonel Bosch as the author of the report in his testimony during the trial in Romagoza v. Garcia, No. 99-8364 (S.D. Fla.).

Defendant has put forward no evidence to show that Plaintiffs' counsel improperly credited Ambassador White's conclusion regarding the report's authorship or that Plaintiffs' counsel improperly discredited statements of Colonel Bosch. Moreover, Defendant had ample opportunity to present the testimony of Colonel Bosch at trial—the appropriate forum for that presentation—and Defendant's belated attempt to undermine the report's authenticity or veracity in his post-trial motion provides an insufficient basis to require a new trial.

2. Photographs

Defendant contends that the Court erred by admitting "highly inflammatory photographs depicting numerous dead bodies and victims of alleged military atrocities, for which there was no direct causal relationship to any conduct of the Defendant." (Def.'s Mot. ¶ 7.) Defendant argues that these photographs (Exhibits 20, 22, 25, and 26) "grossly prejudiced and inflamed" the jury. This argument is without merit.

As Plaintiffs point out, the photographs are relevant to show that the Salvadoran military was engaged in a widespread and systematic attack against a civilian population—an element that Plaintiffs Chavez, Revelo, and Alvarado were required to prove as part of their claims for crimes against humanity. The photographs are also relevant to show that Defendant had notice of his subordinates' human rights abuses, which Plaintiffs had to prove under the doctrine of command responsibility. Taking these considerations into account, the Court correctly determined, under Federal Rules of Evidence 401, 402, and 403, that the photographs were relevant and that their probative value outweighed any danger of unfair prejudice.

3. Expert Witness Testimony

Next, Defendant argues that it was error for the Court to allow Plaintiffs' expert witnesses "to testify in reliance upon inadmissible hearsay and inflammatory irrelevant information," including

"hearsay evidence regarding unknown and unidentified third parties and outrageous conduct committed after the Defendant was no longer associated with the military and after [he] had left El Salvador." (Def.'s Mot. ¶ 8.)

Contrary to Defendant's assertion, expert witnesses may base their opinions on information and facts of a type reasonably relied upon by experts in their particular field that are otherwise inadmissible. Fed. R. Evid. 703. Defendant does not specify what information was improperly relied upon by Professor Karl or Ambassador White. The Court has reviewed the testimony of these witnesses and finds that the intelligence reports relied upon by Ambassador White and the interviews and research relied upon by Professor Karl are of the sort reasonably relied upon by experts in their fields. In addition, the Court properly allowed Plaintiffs' experts to testify about events that affected individuals other than Plaintiffs or their families, as evidence of other human rights abuses committed by military officers or personnel is relevant to the widespread or systematic attack element of Plaintiffs' crimes against humanity claim and to the doctrine of command responsibility. See Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1353-54 (N.D. Ga. 2002); Xuncax v. Gramajo, 886 F. Supp. 162, 172-73 (D. Mass. 1995).

Defendant also objects to Professor Karl's testimony on military procedures and command responsibility "because she never served in any military organization and did not have military training or education . . . ." (Def.'s Mot. ¶ 9.) The

Court overruled this objection at trial and permitted Professor Karl to testify about the Salvadoran military and command structure because the Court found that these matters were within her expertise. The Court noted that Defendant could cross-examine Professor Karl on her credentials and that it was for the jury to decide how much weight to give her testimony. (Tr. 903-04.) Defendant offers no explanation or authority for his argument that Professor Karl was unqualified to testify on military matters in El Salvador during the relevant period, and, indeed, Professor Karl's credentials and testimony strongly belie this contention. Moreover, Defendant has failed to specify which testimony he believes Professor Karl was unqualified to give or how he was unfairly prejudiced by this testimony.

Defendant's thirteenth assignment of error states, in its entirety, that "[t]he Court erred as a matter of law by allowing Plaintiffs to elicit testimony from their expert witnesses, as well as [ ] argue to the jury about 'other cases', which was prejudicial to Defendant." (Def.'s Mot. ¶ 13.) The Court is unaware of the "other cases" to which Defendant refers and is uncertain as to the basis for this objection. Because Defendant has failed to state with particularity the grounds of his argument, the Court cannot examine this basis for a new trial on its merits.

4. Inflammatory References

Defendant next argues that the Court should have granted a mistrial when Plaintiffs' counsel "referred to the post-World War II Nuremberg trials

against Nazi war criminals . . . ." (Def.'s Mot. ¶ 14.) Defendant points out that, in contrast, he was not permitted to ask Plaintiffs' witness, Colonel Jose Luis Garcia, whether "Argentina was, in fact, a haven and refuge for German Nazi war criminals." (Id.)

Plaintiffs' counsel made the statement to which Defendant objects in her closing argument on punitive damages:

> As your verdict has indicated, you have recognized that crimes against humanity occurred in El Salvador under Colonel Carranza's watch. The term crimes against humanity was coined to express the outrage of the whole world at the crimes of World War II. It is a recognition that there are acts which are so offensive that they are crimes against all humankind. They're crimes against every one of us.

(Tr. 1891.) Plaintiffs point out that this was their only reference to World War II and that they did not attempt to connect Defendant to the crimes committed during World War II.

In determining whether a new trial is appropriate, the Court "must consider the frequency of the allegedly objectionable comments and the manner in which the parties and the court treated the comments." Clemens v. Wheeling & Lake Erie R.R., 99 Fed. Appx. 621, 626 (6th Cir. 2004). In Clemens, as here, counsel made only one

objectionable remark during closing argument and, moreover, the comment referred to an issue of damages. The Sixth Circuit found that "counsel's isolated comment was therefore unlikely to have influenced the jury's verdict." Id. Similarly, the Court finds that in this case, Plaintiffs' counsel's reference to the crimes of World War II was neither inflammatory nor prejudicial, and a new trial is not warranted on this basis.

Further, Plaintiffs' objection to Defendant's attempt to question Colonel Jose Luis Garcia on whether Argentina was a haven and refuge for German Nazi war criminals was properly sustained at trial. Defendant has not put forward an explanation—either at trial or in the instant motion—of how this line of questioning is relevant or a proper basis upon which to impeach Colonel Garcia's credibility. Accordingly, this argument is without merit.

5. Law of Command Responsibility

Defendant contends that Plaintiffs failed to prove a causal connection between Plaintiffs' injuries and Defendant's actions. As Defendant puts it, "it is basic tort law that there must be a causal relationship in connection between the act and injury." (Def.'s Mem. Supp. Mot. 8.) The law of command responsibility under which Defendant was found liable, however, does not require proof that a commander's behavior proximately caused the victims' injuries. Hilao v. Estate of Marcos, 103 F.3d 767, 774 (9th Cir. 1996). As the Eleventh Circuit has

explained, "the concept of proximate cause is not relevant to the assignment of liability under the command responsibility doctrine [because] the doctrine does not require a direct causal link between a plaintiff victim's injuries and the acts or omissions of a commander." Ford v. Garcia, 289 F.3d 1283, 1298 (11th Cir. 2002)(emphasis in original). Accordingly, Plaintiffs were not required to submit proof of proximate cause in order to succeed on their claims under the law of command responsibility, and the Court was not required to instruct the jury on this issue.[5] In addition, Defendant fails to put forward any explanation as to why the Court's jury instructions on the law of command responsibility were "erroneous." (Def.'s Mot. ¶ 15(b)). Accordingly, the Court will not address this objection.

6. Number of Jurors

Defendant argues that the Court erred by denying Defendant's pretrial Motion for Trial by Jury with Twelve Jurors. Defendant states that he "does not contend that he has an exclusive right to demand twelve (12) jurors to try his case but, on the other hand, contends that the trial court has discretion and authority to permit twelve (12) jurors to sit as jurors . . . ." (Def.'s Mem. Support Mot. 7.) To the extent that Defendant is arguing that the Court did not recognize its discretion under Federal

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[5] Defendant's related argument—that the Court should not have allowed Plaintiffs to bring their claims under the theory of command responsibility because "there has not been any specific body of civil law on the subject, except in other cases advanced by Plaintiffs' counsel and their Center for Justice and Accountability"—is simply incorrect and does not merit further discussion.

Rule of Civil Procedure 48 to "seat a jury of not fewer than six and not more than twelve members[,]" Defendant is incorrect. The Court exercised its informed discretion to seat a ten-member jury, nine of whom ultimately reached a unanimous verdict as to the claims of Plaintiffs Santos, Calderon, Franco, and Alvarado.[6] As the Supreme Court has held, "a jury of six satisfies the Seventh Amendment's guarantee of trial by jury in civil cases." Colgrove v. Battin, 413 U.S. 149, 160 (1973). The Defendant had no right to a twelve-person jury, and his argument does not compel a new trial in this case.

As set forth above, none of Defendant's arguments in support of his motion for a new trial are meritorious, and Defendant's motion is DENIED.

V. Motion for Remittitur

The jury in this case awarded Plaintiffs Santos, Calderon, Revelo, and Alvarado $500,000 each in compensatory damages and $1,000,000 each in punitive damages. Defendant claims that the award of punitive damages is "patently excessive" for a "senior citizen on Social Security," and it is not supported by the evidence, as Plaintiffs failed to present any evidence as to his financial wealth. (Def.'s Mot. ¶¶ 16-17.)

A court may order a remittitur if an award of punitive damages is grossly excessive. Argentine v. United Steelworkers of Am., AFL-CIO, 287 F.3d 476, 487 (6th Cir. 2002)(citing BMW of N. Am., Inc. v.

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[6] One juror was excused for cause on the first day of trial.

Gore, 517 U.S. 559 (1996)). In determining whether an award of punitive damages is grossly excessive, "a court should consider (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and his punitive damage award; and (3) the difference between the punitive damages and the civil penalties authorized or imposed in comparable cases." Id.

Consideration of these factors supports the jury's award of punitive damages in this case. By finding Defendant responsible for acts of torture and summary executions of Plaintiffs and/or their family members, as well as finding that these acts were carried out as part of a widespread or systematic attack directed at a civilian population, the jury clearly found Defendant's conduct to be reprehensible. Second, the award of punitive damages bears a "reasonable relationship" to the award of compensatory damages. Id. at 583. The ratio between compensatory and punitive damages in this case is 2:1, which the Court does not find to be unreasonable. See Argentine, 287 F.3d at 488 (finding ratio of 42.5 to 1 to be reasonable where monetary damage to plaintiffs' reputations and free speech rights difficult to assess).

Finally, the award of punitive damages in this case is at the low end of the range of awards in other cases involving violations of the TVPA and ATCA. See Doe v. Saravia, 348 F. Supp. 2d 1112, 1158-59 (E.D. Cal. 2004)(listing punitive damages awards in TVPA and ATCA cases ranging from $1 million to $35 million). Plaintiffs note that in a case factually

similar to this one, a jury awarded three Salvadoran torture survivors punitive damages in the amounts of $5 million, $10 million, and $5 million, respectively, against former General Vides Casanova, who served as Director General of El Salvador's National Guard from 1979 to 1983. The jury also awarded two of the survivors $10 million each against former General Guillermo Garcia, who served as Minister of Defense of El Salvador during the same period. (Pls.' Mem. Support Opp. Def.'s Mot. 19, Ex. D (Arce v. Garcia, Case No. 99-8364, Final J. (S.D. Fla. July 31, 2002)). In Arce, as here, the defendants were held liable under a theory of command responsibility for the torture inflicted by Salvadoran military personnel under the defendants' command. See Arce v. Garcia 434 F.3d 1254, 1257-59 (11th Cir. 2006). In light of the awards in Arce and other comparable cases, as well as the other two factors discussed above, the Court does not find the punitive damages award to be grossly excessive. Remittitur is not warranted in this case.

Defendant's other argument in support of remittitur—that Plaintiffs failed to present evidence of Defendant's financial wealth as "a required ingredient of an award for punitive damages"—is not persuasive. Defendant has not presented any authority, and the Court has found none, to support the contention that a plaintiff must submit proof of a defendant's finances in order to sustain an award of punitive damages. The jury was instructed that, among several other factors, it could consider Defendant's net worth and financial condition when determining whether to award punitive damages. (Tr. 1909.) Defendant's counsel, in fact, argued that

Defendant is "not a rich person" and that the compensatory damages award alone would result in "severe financial consequences" for Defendant. (Id. at 1904-05.) As the jury was properly instructed on this factor, Defendant's argument does not support a remittitur of the punitive damages awards in this case.

VI. Conclusion

For all the reasons set forth above, Defendant's Motion for Judgment Notwithstanding the Verdict, New Trial, and/or Remittitur is DENIED.

So ORDERED this 15th day of August, 2006.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

ANA PATRICIA CHAVEZ,	)	
CECILIA SANTOS,	)	
JOSE FRANCISCO CALDERON,	)	
ERLINDA REVELO, and	)	
DANIEL ALVARADO,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 03-2932 MI/P
	)	
NICOLAS CARRANZA,	)	
	)	
Defendant.	)	

ORDER DENYING IN PART AND GRANTING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Before this Court is Plaintiffs' Motion for Summary Judgment, filed June 24, 2005. Defendant responded in opposition on July 27, 2005, and Plaintiffs filed a reply on October 13, 2005. For the reasons set forth below, Plaintiffs' motion is GRANTED in part and DENIED in part.

I. Background and Relevant History

Plaintiffs, who are or were at all pertinent times citizens of El Salvador, filed their original complaint in this action pursuant to the Torture Victims Protections ACT ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (enacted March 12, 1992) (codified as Note to 28 U.S.C. § 1350), and the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, on December 10, 2003. Plaintiffs filed an Amended Complaint on July 29, 2004, and a Second Amended Complaint on June 20, 2005. On September 30, 2004, the Court denied Defendant's motion to dismiss and renewed motion to dismiss, and on October 18, 2005, it denied Defendant's motion for judgment on the pleadings, or in the alternative, for summary judgment.

According to Plaintiffs, Defendant, Nicolas Carranza, served as El Salvador's Subsecretary of Defense and Public Security, from about October, 1979, until January, 1981, during which time he "exercised command and control over the three units of the Salvadoran Security Forces—the Guardia Nacional ('National Guard'), Policia Nacional ('National Police'), and Policia de Hacienda ('Treasury Police')." (Second Am. Compl. ¶¶ 2-3.) He served as Director of the Treasury Police from about June, 1983, until May, 1984, during which time he "possessed and exercised command and control over the Treasury Police." (Id. ¶ 3.) Plaintiffs' Second Amended Complaint alleges that Mr. Carranza "exercised command responsibility over, conspired with, or aided and abetted subordinates in the Security Forces of El Salvador, or persons or groups acting in coordination with the Security Forces or

under their control, to commit acts of extrajudicial killing, torture, and crimes against humanity, and to cover up these abuses." (Second Am. Compl. ¶ 2.) Defendant has resided in the United States since 1984 and is currently a resident of Memphis, Tennessee.

Plaintiffs claim that Defendant bears command responsibility for certain predicate acts—namely, the torture, extrajudicial killing, and crimes against humanity that Plaintiffs and their family members have allegedly suffered. (Pls.' Mot. Summ. J., at 1.) The doctrine of command responsibility requires that Plaintiffs prove (1) the occurrence of each predicate act and (2) that Defendant is liable as the commander of those who perpetrated the acts. (Id. at 1-2.) Plaintiffs seek summary judgment on the predicate acts of torture and extrajudicial killing under the TVPA and the ATCA. They argue that there is "overwhelming evidence in the record" to support these claims. In addition, by granting summary judgment, "the Court will narrow the complex body of facts and law that the jury will be required to consider at trial and thereby promote trial efficiency." (Id. at 1.)

II. Undisputed Facts

The facts underlying Plaintiffs' claims are largely undisputed. Plaintiff Ana Maria Chavez ("Chavez") is a citizen of El Salvador, a legal permanent resident of the United States and a current resident of California. (Second Am. Compl. ¶ 8.) On July 26, 1980, Chavez, her partner, Carlos Omar Reyes, and her infant daughter were at

Chavez's parents' home in El Salvador for a visit. Her parents, Guillermina and Humberto Chavez, were school teachers and members of the teachers' union in Ahuachapan, El Salvador. That morning, Chavez saw "in the corridor of the house a man dressed in civilian clothes, wearing a mask, and carrying a rifle." This individual grabbed Chavez's mother and threw her on the bed. More armed men, dressed similarly, entered the house. One threw Chavez on the bed next to her mother. The men beat Chavez's mother, and opened "all the drawers in the bedroom wardrobe, and demanded to see propaganda and money." Chavez and her infant daughter were taken to another room, where Chavez could hear her mother's continued beating, and then gunshots. Once it was quiet, Chavez left the room and found that her mother had been killed. She subsequently found her partner at the neighbor's house and her father in the corridor of her parents' home. Both had been shot. (Def.'s Resp. Pls.' Statement Mat. Facts ("Def.'s Resp. Pls.' SOMF") ¶¶ 2-11.)

Cecilia Santos ("Santos") is a native of El Salvador, a naturalized citizen of the United States, and a resident of New York. (Second Am. Compl. ¶ 9.) According to the undisputed facts, Santos was a student at the National University of El Salvador and worked full-time for the Salvadoran Ministry of Education in 1980. On September 25, 1980, Santos was in the restroom at a shopping mall in San Salvador when she heard a loud noise that sounded like an explosion. Two private security guards entered the restroom and began questioning Santos about the sound. They subsequently took Santos to

an office in the mall and "accused her of having planted a bomb, offering what appeared to be a box of cigarettes as proof." An individual in the office made a telephone call, and thirty minutes later, "two men dressed in civilian clothes came to the office and took Ms. Santos away in a taxi." (Def.'s Resp. Pls.' SOMF ¶¶ 16-22.)

After driving for approximately twenty minutes, they reached the headquarters of the National Police, whereupon Santos was "turned over to the Corporation of National Investigation," a subsection of the National Police agency. Santos was blindfolded, led through a tunnel, and "crossed a larger room where she heard the sounds of many people moaning and groaning on the floor." Santos was seated in a room with several men in it and was told, "[i]t will be easy if you cooperate with us." One of the men interrogated Santos, asking her about her family members, co-workers and classmates. Another "groped her by pressing on her breasts and legs, and trying to put his hand inside her blouse and skirt[;] later . . . one of her interrogators pulled her partially out of the chair and forced an object into her vagina." Santos screamed in pain, to which one of the men replied, "[t]hat's nothing. That's just to test." Another said, "[d]o you remember where you are? This is the National Police Headquarters, and here we decide what is going on, what can . . . happen to you." An interrogator inquired whether Santos knew how to make a bomb and told her that she had to know, since she was in the University. "The man dipped a Q-Tip into a bottle of sulphuric acid and inserted it into Ms. Santos' nose. He also dropped acid onto Ms. Santos' right hand, which

caused it to blister almost immediately." Later, "while one man monitored her heart rate with a stethoscope, another man attached wires around the fingers of Ms. Santos' right hand and administered electric shocks." (Def.'s Resp. Pls.' SOMF ¶¶ 23-37.)

During the interrogation, the men placed pictures of different individuals before Santos and asked her to identify them. She later signed a blank piece of paper, "with the assistance of one of her interrogators." After her interrogation ended, one of the men who had been questioning her took her "to a man in a green uniform, who was to place her in a cell." Her interrogator instructed the man that Santos "is in the deposit of the Ministry of Defense." (Def.'s Resp. Pls.' SOMF ¶¶ 38-41.)

Plaintiff Jose Francisco Calderon ("Calderon") is a native of El Salvador, a naturalized citizen of the United States, and a resident of California. (Second Am. Compl. ¶ 10.) According to Plaintiffs' undisputed statement of facts, Calderon's father ("Paco") was a school principal and, like Chavez's parents, a member of the teachers' union in Ahuachapan, El Salvador. In June 1980, Calderon's father was arrested for possession of flyers that "instructed the population about what to do in the event of a general strike or a natural disaster." Calderon testified that "when you have one of those flyers, the army sees you as a subversive." (Calderon Dep., Pls.' Mem. Supp. Mot. Summ. J. Ex. E at 18.) Upon his release, Plaintiff Calderon's father moved in with Calderon in San Salvador. On September 11, 1980, uniformed members of the National Police wearing bulletproof vests came to Calderon's house

and demanded entry. Calderon opened the door, and "several men in civilian clothes entered the house." One of the men, "was wearing a mask and carried a G3 military-issued rifle," forced Calderon on the floor, stepped on him and pointed the rifle at his back. The men also detained Calderon's father, at which point they "broke the light bulbs in the living room, then fired five gunshots from the G3 rifles into Paco Calderon's body." Calderon "thought that he would be shot next," but the men left. (Def.'s Resp. Pls.' SOMF ¶¶ 42-55.)

Plaintiff Erlinda Revelo, ("Revelo")[1] is a citizen and current resident of El Salvador. (Second Am. Compl. ¶ 11.) According to Plaintiffs,[2] Revelo's husband, Manuel Franco, was a professor at the National University in El Salvador and a prominent leader of the Democratic Revolutionary Front (FDR) in 1980. On November 27, 1980, Revelo's husband and five other FDR leaders were abducted "in a military operation in which the perimeter of the school was secured by the Treasury Police." Franco's body was later dumped on the side of the road on the

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[1] Revelo originally brought her claims under a pseudonym, Jane Doe. Her husband's pseudonym was James Doe. The Court granted Plaintiffs' Unopposed Motion Regarding Use of Pseudonyms and to Unseal Documents Filed Under Seal on September 19, 2005.

[2] Plaintiffs rely largely on the findings of fact set forth in the Report of the United Nations Truth Commission on El Salvador ("Truth Commission Report" or "Report"), dated April 1, 1993. The Truth Commission on El Salvador was charged with investigating acts of violence that took place during the country's civil war from 1980 to 1991. (See Truth Comm'n Report, Pls.' Mem. Supp. Mot. Summ. J. Ex. B ("Truth Comm'n Report") at PL0009.)

outskirts of Apulo, El Salvador. When Revelo identified her husband's body, she observed gunshot wounds to her husband's mouth and thorax, as well as "a well-defined burn surrounding his entire neck." (Def.'s Resp. Pls.' SOMF ¶¶ 56-63.)

Plaintiff Daniel Alvarado ("Alvarado")[3] is a native of El Salvador, is not a United States citizen, and has resided in Sweden since 1986. (Second Am. Compl. ¶ 12; Pls.' Resp. Def.'s SOMF ¶ 4.) Alvarado was abducted in August 1983 by men dressed in civilian clothes and carrying military-issued rifles. He was taken to the Treasury Police headquarters, and placed in a cell. The men connected wires to Alvarado's toes and ran an electric current through his body. They also placed a hood over his head and beat him. The men accused Alvarado "of being a guerrilla fighter" and that he was responsible for the death of Lt. Cmdr. Albert Schaufelberger, a United States military advisor in El Salvador. Alvarado alleges that the individual in charge was Major Ricardo Pozo, the chief of the intelligence section of the Treasury Police and the head of the official Salvadoran investigation into Lt. Cmdr. Schaufelberger's death. Pozo told Alvarado "that his cooperation was necessary because there was a reward for finding the perpetrator of the Schaufelberger assassination, and that Maj. Pozo wanted to give the reward to 'his boys,' Mr. Alvarado's torturers." Alvarado was tortured over the course of four days, after which point he "could not withstand further torture, and he signed a statement, which he did not read, and which he later

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[3] Alvarado originally brought his claims under a pseudonym, John Doe. See supra n.1.

discovered attributed to him responsibility for the Schaufelberger murder." Alvarado was subsequently taken to a media event at the Treasury Police headquarters—at which Defendant presided—and was forced to say that he killed Lt. Cmdr. Schaufelberger. Upon return to his cell, Alvarado was once again tortured with electric shocks, causing him to suffer a nervous breakdown. Alvarado was transferred to another cell within "the more public part" of the Treasury Police headquarters eighteen days later. Several weeks later, he was questioned by two representatives from the United States and was given a polygraph exam, which confirmed Alvarado "had been tortured and that he did not participate in the Schaufelberger assassination." (Def.'s Resp. Pls,' SOMF ¶¶ 64-88.)

III. Standard of Review

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). So long as the movant has met its initial burden of "demonstrat[ing] the absence of a genuine issue of material fact," Celotex, 477 U.S. at 323, and the nonmoving party is unable to make such a showing, summary judgment is appropriate. Emmons v. McLaughlin, 874 F.2d 351, 353 (6th Cir. 1989). In considering a motion for summary

judgment, "the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

When confronted with a properly-supported motion for summary judgment, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see also Abeita v. TransAmerica Mailings, Inc., 159 F.3d 246, 250 (6th Cir. 1998). A genuine issue of material fact exists for trial "if the evidence [presented by the nonmoving party] is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In essence, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

IV. Analysis

Plaintiffs allege that Defendant is liable under a theory of command responsibility for acts of torture, extrajudicial killing, and crimes against humanity that were perpetrated against Plaintiffs and/or their family members. They seek summary judgment on several of these predicate acts: (1) Chavez's claims of torture and extrajudicial killing under the ATCA and the TVPA; (2) Santos's claim of torture under the TVPA; (3) Calderon's claims of

torture and extrajudicial killing under the TVPA; (4) Revelo's claim of extrajudicial killing under the ATCA and the TVPA; and (5) Alvarado's claim of torture under the ATCA and the TVPA. (Pls.' Mot. Summ. J. 2.)

Defendant argues broadly that "Plaintiffs' case and claims are tendered by reliance upon hearsay, double-hearsay, triple-hearsay, irrelevance, denial of due process and all of the other objections" Defendant has set forth in earlier submissions to the Court. (Def.'s Mem. Opp. 1.) In particular, Defendant challenges Plaintiffs' reliance on the Truth Commission Report. He also claims that he "cannot even investigate the truthfulness of the allegations or find witnesses as to the alleged incidents to which he was not present or aware." (Id. at 2.) With the exception of the facts taken from the Truth Commission Report, Defendant does not dispute the facts that underlie Plaintiffs' claims of torture and extrajudicial killing. (See Def.'s Resp. Pls.' SOMF.)[4]

A. Applicable Law

The Alien Tort Claims Act states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the

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[4] Defendant also argues repeatedly that Plaintiffs cannot prove a "causal connection" between the acts complained of and Defendant's knowledge or involvement. As Plaintiffs' motion does not seek summary judgment on any aspect of Defendant's liability under the theory of command responsibility, however, the Court will not address this argument.

United States." 28 U.S.C. § 1350.[5] The Supreme Court recently interpreted the ATCA in Sosa v. Alvarez-Machain, 542 U.S. 692, 124 S.Ct. 2739 (2004). Sosa held that the ATCA is a "jurisdictional statute creating no new causes of action" but that the grant of jurisdiction was "enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time [of its enactment]." 124 S.Ct. at 2761. The Court did not specify which violations of international law norms are actionable under the ATCA, but courts have since construed Sosa to permit claims of torture and extrajudicial killing to go forward under the ATCA. See, e.g., Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1251 (11th Cir. 2005)(holding plaintiffs "can raise separate claims for state-sponsored torture under the [ATCA] and also under the [TVPA]); Mujica v. Occidental Petroleum Corp., 381 F.Supp.2d 1164, 1179 (CD. Cal. 2005)(recognizing claims of torture and extrajudicial killing under ATCA); Doe v. Saravia, 348 F.Supp.2d 1112, 1144-45 (E.D. Cal. 2004)(recognizing claim of extrajudicial killing under ATCA and TVPA); but see Enahoro v. Abubakar, 408 F.3d 877, 885 (7th Cir. 2005)(construing Sosa to limit relief against torture and extrajudicial killing to the TVPA and dismissing plaintiffs' torture claim brought solely under ATCA).

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[5] Courts sometimes refer to this statute as the "Alien Tort Statute" or the "Alien Tort Act." See, e.g., Sosa v. Alvarez-Machain, 542 U.S. 692, 124 S.Ct. 2739 (2004); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

The Torture Victim Protection Act provides that:

> [a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350 note. The TVPA provides an "unambiguous and modern basis for a cause of action" for torture and extrajudicial killing. H.R. Rep. No. 102-367(II), reprinted in 1992 U.S.C.C.A.N. at 86. Unlike the ATCA, both citizens and non-citizens of the United States may file claims under the TVPA. See Saravia, 348 F.Supp.2d at 1145.

B. Torture

To prove a claim of torture under either the ATCA or the TVPA, each Plaintiff must first establish that governmental actors carried out the alleged torture to which they were subjected. See 28 U.S.C. § 1350 note § 2(a)("An individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall . . . be liable . . . ."); H.R. Rep. No. 102-367(III),

reprinted in 1992 U.S.C.C.A.N. at 87 (noting that suits against "purely private groups" are not actionable under the TVPA and that "the plaintiff must establish some governmental involvement in the torture to prove a claim"); Aldana, 416 F.3d at 1247 (recognizing state action as necessary element of torture under the ATCA); Kadic, 70 F.3d at 243-44 (holding torture actionable under the ATCA "only when committed by state officials or under color of law"). When persons who are not government officials "act[ ] together with state officials" or act with "significant state aid[,]" they are deemed governmental actors for the purposes of the state action requirement under the TVPA and the ATCA. Saravia, 348 F.Supp.2d at 1145 (noting courts look to the jurisprudence of 42. U.S.C. § 1983 "as a guide to determine when persons who are not themselves government officials, nonetheless act under apparent authority or color of law").

The TVPA defines torture as any act (1) "directed against an individual in the offender's custody or physical control[;]" (2) that inflicts "severe pain or suffering[,] . . . whether physical or mental[;]" (3) for the purpose of obtaining information, intimidation, punishment or discrimination. 28 U.S.C. § 1350 note § 3(b)(1). The ATCA does not define torture. Courts analyzing ATCA torture claims generally rely on the definition set forth in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), which is substantially the

same as the TVPA definition.[6] See Aldana, 416 F.3d at 1251 (relying on CAT definition of torture to evaluate ATCA claim); see also Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F.Supp.2d 289, 326 (S.D.N.Y. 2003); Kadic, 70 F.3d at 243-44.

1. Chavez

As set forth above, each Plaintiff must first establish that governmental actors were involved to make out a claim of torture under the ATCA and the TVPA. See 28 U.S.C. § 1350 note § 2; H.R. Rep. No. 102-367(111), reprinted in 1992 U.S.C.C.A.N. at 87; Aldana, 416 F.3d at 1247; Kadic, 70 F.3d at 243-44.

Under this standard, a triable issue of material fact exists as to whether government actors were involved in Chavez's alleged torture. The undisputed fact show that masked men—dressed in

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[6] The Convention defines torture as:

> any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Part I, Article I, G.A. Res. 39/46, U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (1984).

civilian clothes, carrying rifles, and demanding propaganda and money—carried out the attack on Chavez's family. (Def.'s Resp. Pls.' SOMF ¶¶ 2-6.) Chavez characterizes this group of men as members of a "death squad" working in cooperation with the government to carry out attacks on civilians, citing the Truth Commission Report, which states that Salvadoran armed forces "operated on the death squad model" and that operations were carried out by "members of the armed forces, usually wearing civilian clothing, without insignias, and driving unmarked vehicles." (Truth Comm'n Report at PL0161, PL0166)("The members of such groups usually wore civilian clothing, were heavily armed, operated clandestinely and hid their affiliation and identity. They abducted members of the civilian population . . . .") Defendant, however, argues that Plaintiffs simply presume—without proof—that the men who killed Chavez's parents were members of government-affiliated death squads. (Def.'s Mem. Opp. Pls.' Mot. Partial Summ. J. at 2.)

The Court agrees that, in order to find the requisite state involvement in Chavez's claims, the Court would have to infer from the fact that government-sponsored death squads operated in El Salvador during this period that the men who killed Chavez's parents must have been members of death squads. On a motion for summary judgment, however, the Court must draw all inferences in the nonmovant's favor. Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986)("A summary judgment movant bears the burden of clearly and convincingly establishing the nonexistence of any genuine issue of material fact, and the evidence as

well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion.") Accordingly, the Court finds that Chavez has failed to demonstrate the absence of a genuine issue of material fact on the issue of state involvement. Cf. Aldana, 416 F.3d at 1248-49 (granting defendants' motion to dismiss torture claim under ACTA and TVPA where plaintiffs' allegation that police knew of and deliberately ignored private security force attack on civilians was based solely on the fact that the police station was nearby). The Court DENIES Chavez's motion for summary judgment as to the predicate act of torture under the ATCA and the TVPA.

2. Santos

Plaintiff Cecilia Santos alleges that she was subject to torture under the TVPA. The undisputed facts demonstrate that Santos suffered severe pain and suffering—she was sexually assaulted, given electric shocks, and burned with acid while in the custody of the Salvadoran National Police. (Def.'s Resp. Pls.' SOMF ¶¶ 28-29, 34-35, 37); see Doe v. Qi, 349 F.Supp.2d 1258, 1317 (N.D. Cal. 2004)(finding "use of particularly heinous acts such as electrical shock or other weapons or methods designed to inflict agony does constitute torture"). Santos was tortured for the purpose of "obtaining information, intimidation, punishment or discrimination," 28 U.S.C. § 1350 note § 3(b), as evidenced by the fact that she was accused of having planted a bomb and asked to identify people in several pictures (Def.'s Resp. Pls.' SOMF ¶¶ 20, 32-33, 38). Finally, Santos has established government involvement in her

torture. She claims that she was in the custody of officials from the Corporation of National Investigation ("CAIN"), a subsection of the Salvadoran National Police,[7] and was repeatedly told that she was in the National Police headquarters. After her torture and interrogation had concluded, one of her interrogators told a "man in a green uniform" that Santos was "in the deposit of the Ministry of Defense." (Id. ¶¶ 23-25, 31, 36, 41.) The undisputed facts plainly indicate that Santos was subjected to severe pain and suffering by individuals acting under color of law for the purpose of obtaining information, intimidation, or punishment. Accordingly, the Court GRANTS Santos' motion for summary judgment as to her predicate act claim that she was tortured under the TVPA.

3. Calderon

Plaintiff Calderon alleges that he was subjected to severe pain and suffering by being forced to witness the death of his father and by being threatened with imminent death. The TVPA defines "mental pain or suffering" as:

> prolonged mental harm caused by or resulting from . . . (C) the threat of imminent death; or (D) the threat that another individual will imminently be subjected to death, severe physical pain

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[7] Defendant admits this statement, as per Santos' testimony, but notes that he was "not familiar with the National Police and did not know the name 'CAIN' and whether it was a proper name." (Id. ¶ 25.)

> or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

28 U.S.C. § 1350 note § 3(b)(2). The undisputed facts show that Calderon's attackers forced him to the ground, stepped on him, and pointed a rifle at his back. After the men shot his father, Calderon thought he would be shot next. (Def.'s Resp. Pls.' SOMF ¶¶ 49-55); see Oi, 349 F.Supp.2d at 1318 (finding plaintiff subjected to mental torture under TVPA where forced to "witness the guards' severe mistreatment of a close friend"); Aldana, 416 F.3d at 1251-52 (finding threats of imminent death to constitute severe mental suffering under both ATCA and TVPA).

Calderon has also established the requirement of state action. He observed "uniformed members of the National Police wearing bulletproof vests" outside his house who demanded that he open the door. One of the men carried a "G3 military-issued rifle." (Def.'s Resp. Pls.' SOMF¶¶ 46-55; see also Truth Comm'n Report at PL0263 ("G3 rifles were the regulation weapon of the security forces at the time and were used by the armed forces of El Salvador in the war against Honduras in 1969."))

Finally, Calderon has demonstrated that the men who carried out the attack and killed his father acted with the purpose of obtaining information, intimidation, punishment, or discrimination. Plaintiffs claim that Calderon was tortured in order

to punish him for his father's "presumed political beliefs and ideology," and they assert that Calderon's father's arrest approximately three months earlier—for possession of allegedly "subversive" flyers—was the motivation behind the killing. (Mem. Support Pls.' Mot. Summ. J. 16.) The Court finds this purported connection somewhat speculative. However, the unexpected, late-night, and forcible nature of the men's entry, as well as the shots fired into the air upon the men's departure, demonstrate a clear effort to intimidate or coerce. Accordingly, the Court concludes that Calderon has established all of the requisite elements of torture, as defined under the TVPA, and GRANTS his motion for summary judgment as to this claim.

4. Alvarado

Finally, Plaintiff Daniel Alvarado seeks summary judgment on his claim of torture under the ATCA and the TVPA. The undisputed facts plainly reveal that Alvarado was subjected to severe pain and suffering by members of the Treasury Police, including electric shocks and beatings. The facts also demonstrate that Alvarado was tortured until he agreed to sign a statement stating that he had murdered Lt. Cmdr. Albert Schaufelberger, a United States military adviser. Finally, Defendant does not dispute that Major Ricardo Pozo, chief of the intelligence section of the Treasury Police and the lead investigator in Lt. Cmdr. Schaufelberger's death, was in charge of the men who tortured Alvarado. (Def.'s Resp. Pls.' SOMF ¶¶ 64-75.) The Court concludes that Alvarado has thus established governmental involvement, as well as the other

elements of torture, under the TVPA and ATCA. His motion for summary judgment as to this predicate act is GRANTED.

C. Extrajudicial Killing

The TVPA defines extrajudicial killing as:

> a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

28 U.S.C. § 1350 note § 3(a). Courts rely on this definition to analyze claims of extrajudicial killing under the ATCA as well. See Saravia, 348 F.Supp.2d at 1148, 1153-54. To make out a claim for extrajudicial killing under both the TVPA and the ATCA, Plaintiffs must show that the killing was carried out under actual or apparent authority, or color of law, of any foreign nation. See 28 U.S.C. § 1350 note § 2(a)("An individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to extrajudicial killing shall . . . be liable . . . ."); H.R. Rep. No. 102-367(III), reprinted in 1992 U.S.C.C.A.N. at 87 (noting that suits against "purely private groups" are not actionable under the TVPA); Saravia, 348 F.Supp.2d at 1149-50 ("Under Section 2(a) of the

TVPA, in order to make out a claim for extrajudicial killing, plaintiff must show that [Defendant] acted under actual or apparent authority, or color of law, of any foreign nation. Courts have generally required this showing for extrajudicial killing claims under the ATC as well."); Kadic, 70 F.3d at 243-44 (holding summary execution actionable under the ATCA "only when committed by state officials or under color of law").

1. Chavez

Chavez seeks summary judgment on her claim that her parents were summarily executed by government-affiliated death squads. As set forth above, however, a triable issue of fact exists as to whether there was government involvement or substantial cooperation between private individuals and the government in her parents' deaths. See supra Part IV B.1. Accordingly, Chavez's motion for summary judgment on these claims, under both the TVPA and the ACTA, is DENIED.

2. Calderon

The undisputed facts surrounding the murder of Calderon's father demonstrate that all of the requirements for extrajudicial killing under the TVPA are met. Namely, Calderon observed men—carrying military-issued rifles and accompanied by members of the National Police—enter his home and deliberately execute his father without judicial process or for any apparent lawful reason. (Def.'s Resp. Pls.' SOMF ¶¶ 46-55.) As Defendant does not dispute Calderon's claim, there is no genuine issue of

material fact on this predicate act. Accordingly, Calderon's motion for summary judgment as to his claim of extrajudicial killing under the TVPA is GRANTED.

3. Revelo

Revelo's claim that her husband, Manuel Franco, was summarily executed is not based on her personal knowledge, but rather on the findings of the Truth Commission Report. See supra n.2. Accordingly, the Court must first determine whether the Report constitutes admissible evidence. See Turner v. Scott, 119 F.3d 425, 430 (6th Cir. 1997)("summary judgment rulings must be based on admissible evidence"); Wiley v. United States, 20 F.3d 222, 226 (6th Cir. 1994)("hearsay evidence cannot be considered on a motion for summary judgment").

Federal Rule of Evidence 803(8)(C) provides an exception to the hearsay rule for "[r]ecords, reports, statements . . . of public offices or agencies, setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." Fed. R. Evid. 803(8)(C). The Rule creates a presumption of admissibility, which the opposing party has the burden to overcome by proving its untrustworthiness. Bank of Lexington & Trust Co. v. Vining-Sparks Sec., Inc., 959 F.2d 606, 616 (6th Cir. 1992).

As a threshold matter, the Truth Commission Report must have been prepared by a "public office or agency" to fall under Rule 803(8)(C). The Report was prepared by the United Nations Truth Commission on El Salvador, which was formally created by the April, 1991, Mexico Agreements between the Government of El Salvador and the Frente Farabundo Martí para la Liberación National ("FMLN"). The Mexico Agreements defined the functions and powers of the Commission, which were expanded by the parties' Peace Agreement in 1992. (Truth Comm'n Report at PL0017-18.) It is apparent that the United Nations Truth Commission on El Salvador is a "public office or agency" under the meaning of Rule 803(8)(C). See United States v. M'Biye, 655 F.2d 1240, 1242 (D.C. Cir. 1981)(finding that United Nations is a "public office or agency" for Rule 803(10) purposes)("The U.N. is an organization composed of nation members. It would defy reason to suppose that such an organization, constituted of public entities of the highest political order, would not itself be a public agency.")

It is equally clear that the Truth Commission Report sets forth "factual findings," and not merely a "recitation of statements of other individuals . . . ." Miller v. Field, 35 F.3d 1088, 1092 (6th Cir. 1994)(holding investigative police reports comprised of summaries of interviews with witnesses, victim, and prosecutor that contained "neither factual findings made by the report's preparers nor conclusions and opinions based upon such factual findings" inadmissible under Rule 803(8)(C)); see also Combs v. Wilkinson, 315 F.3d 548, 555-56 (6th

Cir. 2002)(rejecting argument that investigative report was not admissible under Rule 602 or 803(8) for lack of authors' personal knowledge because such reports "embody the results of investigation and accordingly are often not the product of the declarant's firsthand knowledge")(quotation omitted); Hill v. Marshall, 962 F.2d 1209, 1215 n.2 (6th Cir. 1992)(admitting report under Rule 803(8)(C) based on interviews with witnesses where author did not have personal knowledge of events); Bridgeway Corp. v. Citibank, 201 F.3d 134, 143 (2d Cir. 2000)(holding United States State Department Country Reports for Liberia admissible under Fed. R. Evid. 803(8)(C) and noting the rule "renders presumptively admissible not merely . . . factual determinations in the narrow sense, but also . . . conclusions or opinions that are based upon a factual investigation")(internal quotations omitted). Finally, it is evident, as set forth above, that the Report's findings resulted "from an investigation made pursuant to authority granted by law." Fed. R. Evid. 803(8)(C); (Truth Comm'n Report at PL0009)(noting Commissioners "were entrusted with their task by the Secretary-General of the United Nations").

Having concluded that the Truth Commission Report is presumptively admissible, Defendant has the burden to prove that the Truth Commission Report is not sufficiently trustworthy. See Bank of Lexington & Trust Co., 959 F.2d at 616. To determine whether a report is trustworthy, the court considers four factors: (1) the timeliness of the investigation, (2) the special skill or experience of the investigators, (3) whether the agency held a

hearing, and (4) possible motivational problems. Id. Defendant's sole argument is that the Report is based on hearsay, not first-hand knowledge. (Def.'s Mem. Opp. Pls.' Mot. Summ. J. 4.) This recitation is insufficient to overcome the Report's presumptive admissibility, and it is clear that the Report satisfies each of the four indicators of trustworthiness.

First, the Report is based on an investigation that began in a timely fashion upon the signing of the Peace Agreement between the Salvadoran government and the FMLN. (Truth Comm'n Report at PL0009, PL0018)(noting work began on July 13, 1992, following signing of Peace Agreement in January). Second, the credentials of the Commissioners—a former president of Columbia; a congressman and former Minister of Foreign Affairs of Venezuela; and an international law professor in the United States and former president of the Inter-American Court of Human Rights—as well as their advisors, consultants, and researchers appear more than sufficient to satisfy the requirement that the investigators have special skill or experience. (See id. at PL0236-43.) The third factor under the trustworthiness inquiry is whether the agency held a hearing. While the Truth Commission did not hold formal hearings, it did conduct numerous interviews and examined thousands of complaints, court papers, and other documents. (Id. at PL0010.)

Finally, there is no evidence of "motivational problems" or bias in the Commission's methodology or conclusions. (See id. at PL0025-26)("[T]he Commission felt that it had a special obligation to

take all possible steps to ensure the reliability of the evidence used to arrive at a finding. In cases where it had to identify specific individuals as having committed, ordered or tolerated specific acts of violence it applied a stricter test of reliability. . . . In order to guarantee the reliability of the evidence it gathered, the Commission insisted on verifying, substantiating and reviewing all statements as to facts, checking them against a large number of sources whose veracity had already been established.")

As the Truth Commission Report exhibits all four indicators of trustworthiness and Defendant has offered nothing to rebut its admissibility, the Court finds that the Report is admissible under Rule 803(8)(C) of the Federal Rules of Evidence. Having determined that the Report is admissible, the Court now turns to the sufficiency of Revelo's allegations of the extrajudicial killing of her husband, Manuel Franco.

According to the Truth Commission report, Franco was a leader of the Democratic Revolutionary Front ("FDR"). On November 27, 1980, Franco and five other FDR leaders were abducted by "one or more public security forces" from the Colegio San Jose, in San Salvador. Treasury Police provided the external security operation, "which aided and abetted the perpetrators." (Truth Comm'n Report at PL0068-69.) Their bodies were later dumped along the road outside of San Salvador. (Id. at PL0070.) Revelo found her husband's body on the floor of a funeral home and observed gunshot wounds to his

mouth and thorax, as well as a "very well-defined burn that surrounded his entire neck." (Revelo Dep. at 31.) The Court finds that there is no genuine issue of material fact on Revelo's claim that her husband was killed without judicial process by state actors. Accordingly, Revelo's motion for summary judgment as to her extrajudicial killing claim under the ATCA and the TVPA is GRANTED.

VI. Conclusion

For all of the reasons set forth above, Plaintiff Chavez's motion for summary judgment on her claims of torture and extrajudicial killing under the ATCA and the TVPA, as predicate acts under Plaintiffs' theory of command responsibility, is DENIED. Plaintiff Santos' motion for summary judgment on her claim of torture under the TVPA, as a predicate act under Plaintiffs' theory of command responsibility, is GRANTED. Plaintiff Calderon's motion for summary judgment on his claims of torture and extrajudicial killing under the TVPA, as predicate acts under Plaintiffs' theory of command responsibility, is GRANTED. Plaintiff Revelo's motion for summary judgment on her claim of extrajudicial killing under the TVPA and the ATCA, as predicate acts under Plaintiffs' theory of command responsibility, is GRANTED. Plaintiff Alvarado's motion for summary judgment on his claim of torture under the TVPA and the ACTA, as a predicate act under Plaintiffs' theory of command responsibility, is GRANTED.

So ORDERED this [25] day of October, 2005.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

ANA PATRICIA CHAVEZ,	)	
CECILIA SANTOS,	)	
JOSE FRANCISCO CALDERON,	)	
JANE DOE and JOHN DOE,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 03-2932 MI/P
	)	
NICOLAS CARRANZA,	)	
	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS, AND IN ADDITION THERETO OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Before the Court is the Motion of the Defendant, Nicolas Carranza, for Judgment on the Pleadings, and in Addition Thereto or in the Alternative, for Summary Judgment, filed June 24, 2005. Plaintiffs responded in opposition on July 27, 2005. For the following reasons, the Court DENIES Defendant's motion.

I. Background

Plaintiffs, who are or were at all pertinent times citizens of El Salvador, filed their original complaint in this action pursuant to the Torture Victims Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (enacted March 12, 1992)(codified as Note to 28 U.S.C. § 1350), and the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, on December 10, 2003. Plaintiffs filed an Amended Complaint on July 29, 2004, and a Second Amended Complaint on June 20, 2005. Plaintiffs allege that Defendant is liable for the extrajudicial killings and/or torture of themselves or members of their immediate families that were committed by the Salvadoran Security Forces or the Salvadoran Treasury Police in the early 1980s.

According to Plaintiffs, Defendant, Nicolas Carranza, served as El Salvador's Subsecretary of Defense and Public Security, from about October, 1979, until January, 1981, during which time he "exercised command and control over the three units of the Salvadoran Security Forces—the Guardia Nacional ('National Guard'), Policia Nacional ('National Police'), and Policia de Hacienda ('Treasury Police')." (Second Am. Compl. at 2-3.) He served as Director of the Treasury Police from about June, 1983, until May, 1984, during which time he "possessed and exercised command and control over the Treasury Police." (Id. at 3.) Plaintiffs' Second Amended Complaint alleges that Mr. Carranza "exercised command responsibility over, conspired

with, or aided and abetted subordinates in the Security Forces of El Salvador, or persons or groups acting in coordination with the Security Forces or under their control, to commit acts of extrajudicial killing, torture, and crimes against humanity, and to cover up these abuses." (Second Am. Compl. ¶ 2.) Defendant has resided in the United States since 1984 and is currently a resident of Memphis, Tennessee.

Defendant filed a Motion to Dismiss on January 20, 2004, arguing that Plaintiffs' claims are barred by the statute of limitations and that this Court lacks subject matter jurisdiction. Defendant then filed a Renewed Motion to Dismiss on March 9, 2004, setting forth similar arguments to those made in the original Motion to Dismiss. The Court denied Defendant's motions on September 30, 2004.

Defendant moves for judgment on the pleadings and/or summary judgment on three grounds: (1) the claims of each Plaintiff are time-barred; (2) Plaintiffs' claims are barred under Salvadoran law, and the United States "should give full faith and credit to the sovereign legal laws of the nation of El Salvador by reason of the accord of nations and comity between nations and the common law doctrine of full faith and credit"; and (3) there is no genuine issue of material fact as to any of Defendant's affirmative defenses. (Mot. J. Pleadings, or in the Alternative, Summ. J. ¶¶ 1-3.)

II. Standard of Review

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). So long as the movant has met its initial burden of "demonstrat[ing] the absence of a genuine issue of material fact," Celotex, 477 U.S. at 323, and the nonmoving party is unable to make such a showing, summary judgment is appropriate. Emmons v. McLaughlin, 874 F.2d 351, 353 (6th Cir. 1989). In considering a motion for summary judgment, "the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

When confronted with a properly-supported motion for summary judgment, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see also Abeita v. TransAmerica Mailings, Inc., 159 F.3d 246, 250 (6th Cir. 1998). A genuine issue of material fact exists for trial "if the evidence [presented by the nonmoving party] is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In essence, the inquiry is "whether the

evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

The standard of review for a judgment on the pleadings is the same as that for a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Grindstaff v. Green, 133 F.3d 416, 421 (6th Cir. 1998). "We must construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief." E.E.O.C. v. J.H. Routh Packing Co., 246 F.3d 850, 851 (6th Cir. 2001)(quotation omitted).

III. Analysis

A. Statute of Limitations and Equitable Tolling

Defendant acknowledges that this Court has previously ruled that "extraordinary circumstances" warrant the equitable tolling of the applicable statute of limitation in this case. Defendant urges the Court to reconsider its ruling in light of the Eleventh Circuit's recent decision in Arce v. Garcia, 400 F.3d 1340 (11th Cir. 2005), which held that plaintiffs' claims under the ATCA and the TVPA against former officials in the government of El Salvador during the 1980s were time-barred. The Court declines to do so.

Arce involved claims under the ACTA and the TVPA against the former minister of defense of El Salvador and the former director-general of El Salvador's National Guard during the late 1970s and early 1980s. The plaintiffs were three Salvadoran individuals who claimed they were tortured by government soldiers during the country's civil war. At trial, the jury found for the plaintiffs, and the defendants appealed, arguing that the district court erred by failing to dismiss the plaintiffs' claims as time-barred under the relevant statutes of limitation. The Court of Appeals for the Eleventh Circuit held that the plaintiffs "failed to present sufficient evidence . . . [to] satisfy the requirements for equitable tolling" and therefore, their claims were time-barred. The court vacated the jury's verdict and dismissed the plaintiffs' claims. Id. at 1345, 1351.

On August 5, 2005, however, after Defendant filed his motion for judgment on the pleadings and/or summary judgment, the Eleventh Circuit vacated its order in Arce without explanation.[1] Since the Arce opinion has been vacated, it has little persuasive effect, and this Court will not revisit its previous ruling in light of the Eleventh Circuit's analysis. Even if the Arce opinion had not been vacated, however, it does not constitute authority binding on this Court.

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[1] Plaintiffs submitted a copy of the order to this Court on August 24, 2005. (See Notice of Supp. Authority Support Pls.' Opp. to Def.'s Mot. Summ. J.)

Moreover, the holding in Arce does not compel a different result in this case, as this Court has already examined Defendant's statute of limitations argument at length. In its order denying Defendant's motions to dismiss, the Court rejected Defendant's position—that the ten-year statute of limitations should not be equitably tolled—after careful consideration of both the facts and applicable case law. Accordingly, Defendant's motion for judgment on the pleadings and motion for summary judgment on this ground is DENIED.

B. Doctrine of Comity

Defendant next argues that the Court should decline to exercise jurisdiction in this case based on the doctrine of comity and full faith and credit. In particular, Defendant argues that the broad amnesty law passed by the Salvadoran Legislature at the conclusion of the country's civil war "is entitled to full faith and credit and is entitled to recognition in the United States" and "the courts of the United States should not exercise jurisdiction which circumvents the sovereign law of El Salvador." (Def.'s Mem. Support. Mot. J. Pleadings or in the Alternative, Summ. J. ("Def.'s Mem.") at 9.) The amnesty law grants a "broad, absolute and unconditional amnesty . . . in favor of all those who in one way or another participated in political crimes, crimes with political ramifications. or common crimes committed by no less than twenty people, before January 1, 1992." Doe v. Saravia, 348 F.Supp.2d 1112, 1133 (E.D. Cal. 2004)(quoting 2000 Inter-American Commission on Human Rights

Decision).[2] The Legislative Assembly of El Salvador adopted the law on March 20, 1993, and according to the Saravia court's factual findings, the Salvadoran Supreme Court has twice upheld its constitutionality, in 1993 and 2000, and no prosecutions have taken place under this law. Id.

Plaintiffs argue that Defendant is not entitled to dismissal based on the doctrine of comity because (1) U.S. law and the Salvadoran amnesty law are not in conflict; (2) dismissal on comity grounds would run contrary to the mandate of the TVPA; (3) even if the U.S. law and the amnesty law are in conflict, the Court should not abstain from adjudication; and (4) Defendant's authority is not on point and actually supports Plaintiffs' position. (Id. at 11-16.) The Court finds Plaintiffs arguments persuasive.

International comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other persons who are under the protection of its

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[2] According to a 1994 report of the Inter-American Commission on Human Rights, the "General Amnesty Law for the Consolidation of the Peace" grants a "full, absolute and unconditional amnesty to all those who participated in any way in the commission, prior to January 1, 1992, of political crimes or common crimes linked to political crimes or common crimes in which the number of person involved is no less than twenty." Inter-American Commission on Human Rights, Report on the Situation of Human Rights in El Salvador, Feb. 11, 1994, available at http://www.cidh.oas.org/countryrep/ElSalvador94eng/toc.htm. The slight differences in the language of Saravia and the 1994 report are not important for the purposes of the Court's analysis.

laws." Hilton v. Guyot, 159 U.S. 113, 164 (1895); see also S&S Screw Mach. Co. v. Cosa Corp., 647 F.Supp. 600, 615 (M.D. Tenn. 1986)("International comity is the recognition that one nation accords within its territory to the otherwise nonbinding laws of another nation, having due regard both for international cooperation and for the rights of those who seek the protection of the domestic laws.") Comity is a discretionary doctrine. Hilton, 159 U.S. at 163-64 ("'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.") It is "not a rule of law, but one of practice, convenience and expediency." Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971). The doctrine "neither impels nor obliges the United States district court to decline jurisdiction in a particular case." Bodner v. Banque Paribas, 114 F.Supp.2d 117, 129 (E.D.N.Y. 2000). The party who puts forward the doctrine of comity has the burden to prove that it applies. Sarei v. Rio Tinto PLC, 221 F.Supp.2d 1116, 1200 (C.D. Cal. 2002); Allstate Life Ins. Co. v. Linter Group Ltd., 994 F.2d 996, 999 (2d Cir. 1993).

In order for the issue of comity to arise, there must be an actual conflict between domestic and foreign law. Hartford Fire Ins. Co v. Cal., 509 U.S. 764, 798 (1993); see also Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa, 482 U.S. 522, 555 (1987)(Blackmun, J., concurring and dissenting)("[T]he threshold question in a comity analysis is whether there is in fact a true conflict between domestic and foreign law."); In re Simon,

153 F.3d 991, 998 (9th Cir. 1998) ("[G]eneral principles of international comity . . . [are] limited to cases in which 'there is in fact a true conflict between domestic and foreign law.'"); In re Maxwell Communication Corp., 93 F.3d 1036, 1047 (2d Cir. 1996)("International comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction.")

Where, as here, "a person subject to regulation by two states can comply with the laws of both[,]" there is no conflict for comity purposes. Hartford Fire Ins. Co., 509 U.S. at 799. An example of a foreign law in "direct conflict" with the ATCA is illustrated in Sarei v. Rio Tinto PLC, 221 F.Supp.2d 116 (C.D. Cal. 2002). In Sarei, the government of Papua New Guinea passed a law that prohibited plaintiffs from filing claims involving local mining and petroleum projects in foreign courts. The court found a "clear . . . conflict between the Act's prohibition on filing claims in foreign jurisdictions and the ATCA's vesting of jurisdiction to hear such claims in the United States." Id. at 1204.

In the instant action, there is no conflict between domestic and foreign laws because El Salvador's amnesty law cannot be construed to prohibit legal claims filed outside of El Salvador. The plain language of the law does not support this reading, and Defendant has not put forward any evidence to show that the law has an extraterritorial effect. Application of the ATCA or TVPA in United States federal court does not interfere with the application of the Salvadoran amnesty law. Similarly, Plaintiffs may be barred from filing suit in

El Salvador, but they are not barred from filing suit under United State law. As there is no conflict of law in this case, Defendant has failed to establish the threshold requirement for the applicability of comity principles.

Moreover, the doctrine of comity is only relevant in the absence of contrary congressional direction; it has "no application" where Congress has spoken on the issue. In re Maxwell Communication Corp., 93 F.3d at 1047. Congress established the TVPA to provide "an unambiguous and modern basis for a cause of action" for torture and summary execution committed anywhere in the world and specifically "authorize[d] the Federal courts to hear cases brought" under the Act. H.R. Rep. No. 102-367(III), reprinted in 1992 U.S.C.C.A.N. at 87 (justifying need for Act on grounds that despite "universal consensus condemning" torture and summary execution, many government still engage in or tolerate these abuses and that judicial redress is often "least effective" in those countries); see also Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)(noting "clear mandate appears in the Torture Victim Protection Act of 1991," that creates basis for federal claims of torture and extrajudicial killing).

Congress has also spoken clearly on the use of the Alien Tort Claims Act, noting that claims by aliens for torts committed "in violation of the law of nations" under the ATCA have been "successfully maintained" and that the TVPA should not replace the ATCA. H.R. Rep. No. 102-367(III), reprinted in 1992 U.S.C.C.A.N. at 86 ("[C]laims based on torture or summary executions do not exhaust the list of

actions that may appropriately be covered by section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law."); see also Kadic v. Karadzic, 70 F.3d 232, 241 (2d Cir. 1995)("The scope of the Alien Tort Act remains undiminished by enactment of the Torture Victim Act.") For the Court to decline jurisdiction in this case in deference to El Salvador's amnesty legislation would run contrary to Congress' clear intent to provide a means for victims of violations of the law of nations to seek redress.[3] Accordingly, the Court DENIES Defendant's motion for judgment on the pleadings and motion for summary judgment on this ground.

C. Affirmative Defenses

Defendant also moves for summary judgment on each of his affirmative defenses. (Mot. Def. J. Pleadings and/or Mot. Summ. J. ¶ 3.) The Court has discussed two of Defendant's affirmative defenses—based on the statute of limitations and the doctrine of comity—above. Defendant's other affirmative

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[3] Defendant relies exclusively on Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947), to support his comity argument. Specifically, he claims that Bernstein stands for the principle that "one nation should not abrogate or attempt to interpret the acts and laws of a foreign nation, but should accord them full faith and credit or comity." (Def.'s Mem. at 11.) Bernstein does not concern the doctrine of comity, however. It examines the act of state doctrine, a defense which Defendant has not raised. Furthermore, Plaintiffs are not asking the Court to abrogate or interpret the Salvadoran amnesty law; their claims are brought under U.S. law. Defendant's reliance on Bernstein is misplaced.

defenses, set forth in his Answer, filed June 24, 2005, are: failure to state a claim upon which relief can be granted; the doctrine of latches; denial of due process and equal protection of the law; and that Defendant "has not undertaken any action to personally conceal or hide the claims of the Plaintiffs or to prevent them from commencing legal action against them during the entire period of time he has been in the United States and available for service of process and legal action in the Courts of the United States." (Answer and Aff. Defenses ¶¶ 1-6.) Defendant fails to address any of these affirmative defenses—other than those based on the statute of limitations and doctrine of comity—in his brief to the Court, and as such, Defendant has failed to demonstrate the absence of a genuine issue of material fact on these defenses. Accordingly, the Court DENIES Defendant's motion for summary judgment on his remaining affirmative defenses.

IV. Conclusion

For the foregoing reasons, the Court DENIES Defendant's Motion for Judgment on the Pleadings and in Addition Thereto or in the Alternative, for Summary Judgment.

So ORDERED this [17] day of October, 2005.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

JOSE OSCAR CHAVEZ,	)	
ANA PATRICIA CHAVEZ,	)	
HAYDEE DURAN,	)	
CECILIA SANTOS,	)	
JOSE FRANCISCO CALDERON,	)	
JANE DOE I, JANE DOE II, and	)	
JOHN DOE,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 03-2932
	)	
NICOLAS CARRANZA,	)	
	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S MOTIONS
TO DISMISS THE COMPLAINT

Before the Court are two motions: (1) Defendant's Motion to Dismiss the Complaint, filed January 20, 2004, and (2) Defendant's Renewed Motion to Dismiss, filed March 9, 2004. Plaintiff responded in opposition on April 8, 2004. For the reasons stated below, Defendant's motions are DENIED.

I. Background

According to the Amended Complaint, El Salvador experienced intense political unrest in the late 1970s. Various militant organizations, including the Salvadoran Security Forces, carried out systematic repression and human rights abuses against political dissenters during this time. This led to a civil war that lasted from January, 1981 until January, 1992. On January 16, 1992, a United Nations-sponsored Peace Accord was signed by the Salvadoran government and guerilla forces. In March of 1993, the Salvadoran legislature adopted an amnesty law precluding criminal or civil liability for anyone who committed a political or common crime before January 1, 1992. The first elections following the signing of the Peace Accord were held in March of 1994.

Plaintiffs, who are or were at all pertinent times citizens of El Salvador, filed this action pursuant to the Torture Victims Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (enacted March 12, 1992) (codified as Note to 28 U.S.C. § 1350), and the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, on December 10, 2003. Plaintiffs allege that Defendant is liable for the extrajudicial killing and/or torture of themselves or members of their immediate families that was committed by the Salvadoran Security Forces or the Salvadoran Treasury Police in the early 1980s.

Defendant, Nicolas Carranza, served as El Salvador's Vice-Minister of Defense and Public

Security from about October, 1979 until January, 1981, during which time he exercised control over the three units of the Salvadoran Security Forces. He served as Director of the Treasury Police from about June, 1983 until May, 1984, during which time he exercised control over the Treasury Police. Plaintiffs Amended Complaint alleges that Mr. Carranza "exercised command responsibility over, conspired with, or aided and abetted subordinates in the Security Forces of El Salvador, or persons or groups acting in coordination with the Security Forces or under their control, to commit acts of extrajudicial killing, torture, crimes against humanity, and cruel, inhuman or degrading treatment or punishment, and to cover up these abuses." (Am. Compl. ¶ 2.) Defendant has resided in the United States since 1984, and is currently a resident of Memphis, Tennessee.

Defendant filed a Motion to Dismiss on January 20, 2004, arguing that the claims in the Complaint are barred by the statute of limitations and that this Court lacks subject matter jurisdiction. On February 23, 2004, Plaintiffs filed an Amended Complaint. Defendant then filed a Renewed Motion to Dismiss on March 9, 2004, setting forth similar arguments to those made in the original Motion to Dismiss.

II. Standard of Review

A defendant may move to dismiss a claim "for failure to state a claim upon which relief can be granted" under Federal Rule of Civil Procedure

12(b)(6). When considering a 12(b)(6) motion, a court must treat all of the well-pleaded allegations of the complaint as true, Saylor v. Parker Seal Co., 975 F.2d 252, 254 (6th Cir. 1992). Furthermore, the court must construe all of the allegations in the light most favorable to the non-moving party. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). "A court may dismiss a [claim under 12(b)(6)] only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Scalding, 467 U.S. 69, 73 (1984).

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal for lack of subject matter jurisdiction. The plaintiff has the burden of proving that the court has subject matter jurisdiction. Moir v. Greater Cleveland Reg'l Transit Auth., 895 F.2d 266, 269 (6th Cir. 1990). To do so, the plaintiff must demonstrate that the complaint alleges a substantial federal claim. Musson Theatrical v. Fed. Express Corp., 89 F.3d 1244, 1248 (6th Cir. 1996). Courts construe the allegations of a complaint in the light most favorable to the plaintiff when ruling on a 12(b)(1) motion. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Ludwig v. Bd. of Trustees of Ferris State Univ., 123 F.3d 404, 408 (6th Cir. 1997). If a court determines that it lacks subject matter jurisdiction, "the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3).

III. Analysis

A. Statute of Limitations

Defendant argues that Plaintiffs' claims are barred by the applicable ten-year statute of limitations because the complained of acts took place in the early 1980s, twenty years prior to the commencement of this action. The Torture Victims Protection Act of 1991 provides that "[n]o action shall be maintained under this section unless it is commenced within ten (10) years after the cause of action arose." 28 U.S.C. § 1350 (note). Though the TVPA limitations period does not explicitly apply to the ATCA, courts have applied the TVPA limitations period to the ATCA. See, e.g., Papa v. United States, 281 F.3d 1004, 1011-12 (9th Cir. 2002). Plaintiffs filed their Complaint on December 10, 2003. Therefore, any act occurring prior to December 10, 1993 would be barred by the ten-year statute of limitations applicable to ATCA and TVPA claims.

Each of the acts alleged in the Complaint occurred prior to December 10, 1993. However, Plaintiffs argue that the statute of limitations is subject to equitable tolling in this case. Courts that have addressed the applicability of the ten-year limitations period to TVPA and ATCA actions have held that the doctrine of equitable tolling should apply "where extraordinary circumstances outside plaintiff's control make it impossible for plaintiff to timely assert his claim." Forti v. Suarez-Mason, 672 F. Supp. 1531, 1549 (N.D. Cal. 1987). See also Hilao v. Estate of Marcos, 103 F.3d 767, 773 (9th Cir.

1996).[1] Additionally, the Senate Report on the TVPA states that the ten-year limitations period is subject to equitable tolling. S. Rep. No. 102-249, at 11 (1991).

Plaintiffs assert that the facts alleged in the Complaint are sufficient to toll the ten-year limitations period because they constitute extraordinary circumstances that made it impossible for Plaintiffs to timely file their claims. In particular, the Complaint alleges that the Salvadoran Security Forces engaged in human rights abuses against the citizens of El Salvador beginning in the late 1970s. During this time, the Salvadoran Security Forces worked hand-in-hand with paramilitary groups known as death squads. The death squads and the Salvadoran Security Forces were responsible for the use of torture, forced disappearances, arbitrary detention, and extrajudicial killing of Salvadoran citizens. (Am. Compl. ¶ 17.) These groups allegedly

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[1] The Sixth Circuit has identified five-factors to consider when determining whether to apply equitable tolling, "1) lack of notice of the filing requirement; 2) lack of constructive knowledge of the filing requirement; 3) diligence in pursuing one's rights; 4) absence of prejudice to the defendant; and 5) the plaintiff's reasonableness in remaining ignorant of the particular legal requirement." Graham-Humphreys v. Memphis Brooks Museum of Art, Inc., 209 F.3d 552, 561 (6th Cir. 2000). This test, however, has been applied mainly in Title VII employment discrimination cases. In any event, this five factor test is not comprehensive and "[t]he propriety of equitable tolling must necessarily be determined on a case-by-case basis." Id. at 561 (quoting Truitt v. County of Wayne, 148 F.3d 644, 648 (6th Cir. 1998)). The Sixth Circuit has not addressed the applicability of its five-factor equitable tolling test in TVPA or ATCA actions.

operated with the approval and permission of Mr. Carranza. (Id.)

Due to the repression carried out by the Security Forces and death squads, El Salvador was in a state of civil war during the 1980s and early 1990s. An estimated 75,000 Salvadoran civilians were killed during the course of the war. (Id. ¶ 18.) The Amended Complaint also alleges that during this time, a Catholic Archbishop was murdered while saying mass by persons suspected to be government agents, one of the alleged authors of the crime openly campaigned for the Presidency, the judge investigating the murder was threatened and forced to leave the country, death squads were controlled by the President, and many opposition political leaders were murdered by the Security Forces and death squads. (Id. ¶ 75.) The Salvadoran judicial system allegedly failed to investigate serious crime and not a single Salvadoran officer was ever tried and convicted for human rights abuses in El Salvador. (Id. ¶ 76.)

Among the political leaders allegedly murdered was Decedent James Doe, husband of Plaintiff Jane Doe II. According to the Amended Complaint, James Doe was assassinated by the Security Forces because of his role in the leadership of the Frente Democratico Revolucionario (Democratic Revolutionary Front – hereinafter, "FDR"). (Id. ¶ 19.) The FDR constituted the only political opposition to the ruling government. (Id. ¶ 21.) On November 27, 1980, James Doe was abducted by the Security forces, along with six other FDR leaders, from a school where they were

meeting. The men were tortured and then murdered. (Id. ¶¶ 22-23; 49-51.) After their bodies were found, the criminal court failed to conduct a proper investigation and closed the case in October, 1982. (Id. ¶ 53.)

Since 1979, all Plaintiffs have either been living in El Salvador or have immediate family living in El Salvador. (Pls.' Mem. in Opp'n to Def.'s Renewed Mot. to Dismiss at 10.) Plaintiffs claims concern the murder, rape, and torture of themselves or their relatives by the Security Forces or the Treasury Police during the Salvadoran civil war. Plaintiffs claim they reasonably feared reprisal against themselves or their family members in El Salvador if they complained about the murder, torture, and rape that occurred during this civil war. As the facts detailed above and asserted more fully in the Amended Complaint show, this is an "extraordinary circumstance[] outside plaintiff[s'] control [which made] it impossible for plaintiff[s] to timely assert [their] claim[s]." Forti, 672 F. Supp. at 1549. Thus, equitable tolling should apply.

The next question before the Court is when the statute of limitations should have commenced running. The civil war officially ended with a Peace Accord in January of 1992. However, Plaintiffs argue that the ten-year limitations period should be equitably tolled until March of 1997, when the first relatively peaceful national elections were held after the Salvadoran civil war. Alternatively, Plaintiffs allege that the statute of limitations should be tolled until the first post-war national elections in March of 1994.

The Amended Complaint alleges that the violence synonymous with the Salvadoran civil war continued after the signing of the Peace Accord. Although the Peace Accord provided that the Security Forces would be disbanded, several hundred members of the Treasury Police and National Guard were absorbed into the newly created National Civilian Police. (Am. Compl. ¶ 77.) Death squads linked to the disbanded Security Forces continued to perpetrate violent acts against Salvadoran citizens after the signing of the Peace Accord and before the election of 1994. This violence included the murders of three opposition political leaders, the murders of opposition political activists, and the commission of ninety-four acts of politically motivated abuses of human rights. (Id. ¶ 79.) The Amended Complaint also asserts that violence continued after the election of 1994, with evidence that the Black Shadow death squad committed at least three dozen murders and threatened to execute six judges in early 1995. (Id. at 81.) Plaintiffs assert that the politically motivated violence did not end until the March, 1997 elections, which were peaceful and contained little evidence of fraud. Opposition political leaders won significant posts in the 1997 election and were permitted to safely occupy those posts without fear of reprisals. (Id. ¶ 82.)

The Court finds that the statute of limitations should be tolled until at least March of 1994, when the first national elections occurred after the end of the civil war. It is not necessary for the Court to determine whether the continued violence following the signing of the Peace Accord tolls the limitations period until March of 1994 or March of 1997, when

the first relatively peaceful national elections occurred, because Plaintiffs' claims are timely under either circumstance. Thus, the ten-year statute of limitations applicable to the TVPA and the ATCA does not bar Plaintiffs' claims. The Court DENIES the Motion to Dismiss based on the statute of limitations.

B. Exhaustion of Remedies

Next, Defendant argues that Plaintiffs' claims should be dismissed because Plaintiffs failed to exhaust their remedies under El Salvador law before filing this action. The TVPA states that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350 (note). Nonexhaustion of remedies is an affirmative defense, however, and "[t]he ultimate burden of proof and persuasion on the issue of exhaustion of remedies . . . lies with the defendant." S. Rep. No. 102-249, at 9-10 (1991).

Though Plaintiffs' Complaint implies that Plaintiffs have not pursued any remedies in El Salvador, Plaintiffs assert that they have no adequate or available remedies in El Salvador. The Salvadoran legislature passed an amnesty law in March of 1993 precluding Plaintiffs from seeking relief in El Salvador courts for any political or common crime committed before January 1, 1992. (Am. Compl. at 25.) Defendant has offered nothing to show that remedies are available to Plaintiffs in El Salvador. Therefore, Plaintiffs' failure to pursue

remedies in El Salvador does not bar Plaintiffs' TVPA claims against Defendant. The Court DENIES Defendant's Motion to Dismiss for failure to exhaust remedies under El Salvador law.

C. Subject Matter Jurisdiction

Finally, Defendant argues that this Court lacks jurisdiction over the ATCA claims of Plaintiffs who are citizens of the United States, namely, Jose Oscar Chavez, Haydee Duran, Cecilia Santos, and Jose Francisco Calderon. The ATCA creates jurisdiction in United States courts only for non-citizen plaintiffs who sue a defendant in tort for a violation of international law. 28 U.S.C. § 1350. "[W]hile the [ATCA] provides a remedy to aliens only, the TVPA . . . extends a civil remedy also to U.S. citizens who may have been tortured abroad." S. Rep. No. 102-249, at 5 (1991). In their response, Plaintiffs clarified that while the non-citizen Plaintiffs have brought their claims under both the ATCA and the TVPA, the citizen Plaintiffs assert claims only under the TVPA. Subject matter jurisdiction over the citizen Plaintiffs' TVPA claims is proper in this Court. Because the citizen Plaintiffs do not assert ATCA claims, that aspect of Defendant's motion is DENIED as moot.

IV. Conclusion

For the foregoing reasons, the Court DENIES Defendant's Motion to Dismiss and DENIES Defendant's Renewed Motion to Dismiss.

So ORDERED this [30] day of September, 2004.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES
DISTRICT JUDGE

TITLE 28--JUDICIARY AND JUDICIAL PROCEDURE

PART IV--JURISDICTION AND VENUE

CHAPTER 85--DISTRICT COURTS; JURISDICTION

Sec. 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States.

(June 25, 1948, ch. 646, 62 Stat. 934.)

Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., Sec. 41(17) (Mar. 3, 1911, ch. 231, Sec. 24, par. 17, 36 Stat. 1093).

Words "civil action" were substituted for "suits," in view of Rule 2 of the Federal Rules of Civil Procedure.

Changes in phraseology were made.

Torture Victim Protection

Pub. L. 102-256, Mar. 12, 1992, 106 Stat. 73, provided that:

"SECTION 1. SHORT TITLE.

"This Act may be cited as the 'Torture Victim Protection Act of 1991'.

"SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

"(a) Liability.--An individual who, under actual or apparent authority, or color of law, of any foreign nation--

> "(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> "(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

"(b) Exhaustion of Remedies.--A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

"(c) Statute of Limitations.--No action shall be maintained under this section unless it is

commenced within 10 years after the cause of action arose.

"SEC. 3. DEFINITIONS.

"(a) Extrajudicial Killing.--For the purposes of this Act, the term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

"(b) Torture.--For the purposes of this Act--

"(1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

"(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from--

"(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

"(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

"(C) the threat of imminent death; or

"(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality."

LAW OF GENERAL AMNESTY FOR THE CONSOLIDATION OF PEACE

DECREE Nº 486.

THE LEGISLATIVE ASSEMBLY OF THE REPUBLIC OF EL SALVADOR,

WHEREAS:

I.- The ongoing peace building efforts in El Salvador require fostering public confidence, to reconcile and reunite the Salvadoran family by promulgating, and immediately implementing, legal provisions that protect the right of the entire Salvadoran population to fully conduct its activities in harmony, and a climate of trust and respect for all social sectors;

II.- On January 23, 1992, the Legislative Assembly approved the National Reconciliation Act, as part of Legislative Decree Number 147, published by the Official Gazette (No. 14, Volume 314) on the same date. The Decree granted amnesty -with certain restrictions- to all persons involved -in any manner- in the perpetration of political offenses, the common crimes associated with them, and other common crimes committed [in conspiracy] by twenty or more people, before January 1st, 1992.

III.- The restrictions indicated in the above paragraph did not allow a general application of the National Reconciliation Act to all persons -regardless of their affiliation in the armed conflict- who participated in violent acts against society. This has created an inequitable situation that must be

corrected, as it is contrary with the ongoing democratic process and the reunification of the Salvadoran people;

IV.- In order to foster and achieve national reconciliation, it is advisable to grant broad, absolute and unconditional amnesty to all people who participate -in any manner- in the crimes that took place before January 1, 1992, whether they were political offenses, the common crimes associated with them, and/or other common crimes, perpetrated [in conspiracy] by at least twenty people -including persons already convicted, those undergoing judicial proceedings and others currently unindicted; and to make this benefit extensive to persons not presently included in the National Reconciliation Act who participated -either as primary offenders, or by aiding/abetting or acting as accomplices in said criminal actions.

THEREFORE,

By virtue of its constitutional power, and in endorsing the bill proposed by Congressmen Luis Roberto Angulo Samayoa, Ciro Cruz Zepeda Peña, José Rafael Machuca Zelaya, Rafael Antonio Morán Orellana, Carlos Remberto González, José Roque Calles Amaya, Marcos Alfredo Valladares, Carlos René Calderón y Julio Angel Sorto, [the Legislative Assembly]

HEREBY ENACTS the following:

LAW OF GENERAL AMNESTY FOR THE CONSOLIDATION OF PEACE

Art. 1- Broad, absolute and unconditional amnesty is hereby granted to all persons involved -in any manner- in the perpetration of political offenses, the common crimes associated with them, and other common crimes committed [in conspiracy] by twenty or more people, before January 1st, 1992. This includes persons already convicted, those undergoing judicial proceedings and others currently unindicted for those crimes; This benefit is granted to all primary offenders, as well as those who aided/abetted or participated as accomplices in said criminal actions. This amnesty benefit is made extensive to the persons mentioned under Article 6 of the National Reconciliation Act, which is part of Legislative Decree No. 147, dated January 23, 1992, published by the Official Gazette (No. 14, Volume 314) on the same date.

Art. 2.- For the purpose of this law, political offenses shall include, apart from the crimes specified under article 151 of the Criminal Code, those indicated under articles 400-411 and 460-479 of the same Code, and crimes perpetrated as a result or part of, the armed conflict, regardless of [the perpetrators'] status, activism, affiliation or political ideology

Art. 3.- Amnesty shall not be granted to:

a) Whomever individually or collectively participated in the crimes indicated under the second paragraph of Article 400 of the Criminal Code for profit making purposes,

whether those persons are currently serving, or not, prison sentences for such crimes; and

b) Persons who individually or collectively participated in the crimes of kidnapping and extortion indicated under articles 220 and 257 of the Criminal Code, and the crimes included in *Ley Reguladora de las Actividades Relativas a las Drogas* (Act Regulating Drug Related Activities), whether or not they have been indicted, are currently serving prison sentences for such crimes, and/or the crimes in question were linked to political crimes.

Art. 4.- The amnesty benefit granted under this law will be as follows:

a) In the case of defendants subject to imprisonment sentences, the sentencing judge/court will order *ex officio* the immediate release of the defendant without bail. The same shall apply to the court hearing the case when a ruling is still pending;

b) In the case of fugitives convicted in absentia and sentenced to imprisonment sentences, the judge/court with jurisdictional authority will immediately quash any arrest warrants, *ex officio*, without any bail requirements;

c) In the case of defendants in pending cases, the judge in charge shall dismiss the case, *ex officio*, without restrictions, and rule in favor of the defendants, closing the proceedings and ordering the defendants' immediate release;

d) In the case of unindicted persons, the Decree will allow filing a Motion to Dismiss, and having the case dismissed with prejudice, in the eventuality of their prosecution for the crimes covered under the Amnesty. And if these persons are ever captured, they shall be brought to the judge with jurisdiction over their case, to order their release;

e) Persons who do not fit the above situations, but who, either at their own request, or for any other reason, wish to benefit from this amnesty, may appear before the corresponding trial judge, who shall consider their request and issue a certificate stating the reasons why their citizen rights cannot be denied them; and

f) The amnesty granted under this law shall extinguish civil liability.

Art. 5.- Notwithstanding the terms of paragraphs a), b) and c) above, defendants who have already been tried and wish to benefit from this amnesty, must submit an application in writing -either directly or through their counsel-, or go before a trial judge to request that their case be dismissed; and, if appropriate, the corresponding judge shall dismiss the case, without restrictions, and without any bail requirements.

The motion can also be filed with Justices of the Peace, State Governors, Municipal Mayors and Consuls accredited abroad, who shall refer it to the corresponding Trial Judge, for appropriate action.

If the authorities indicated above do not comply with this requirement, they shall be fined 1,000-5,000 colons by the appropriate judge, pursuant to the terms of article 718, of the Code for Criminal Procedure.

Art. 6.- All provisions contrary to this Law, and particularly Art. 6, and the last paragraph of Article 7, of the National Reconciliation Act, are hereby revoked, including the true interpretation of the former-, all of which provisions were included as part of Decree No. 147, dated January 23, 1992, and published in the Official Gazette (No. 14, Volume 314) on the same date, and Decree No. 164, dated February 6 of that same year, published in the Official Gazette (No.26, Volume 314), on February 10, 1992.

Art. 7.- This Decree shall become effective eight days after its publication in the Official Gazette.

ISSUED IN THE BLUE ROOM OF THE LEGISLATIVE PALACE: San Salvador, on March 20, 1993.

LUIS ROBERTO ANGULO SAMAYOA
CHAIRMAN

CIRO CRUZ ZEPEDA
DEPUTY CHAIRMAN

RUBEN IGNACIO
PEÑA RUBEN
DEPUTY CHAIRMAN

ZAMORA RIVAS

MERCEDES GLORIA SALGUERO GROSS
DEPUTY CHAIRMAN

RAUL MANUEL SOMOZA ALFARO
SECRETARY

GUADALUPE BARRIENTOS
SECRETARY

SILVIA ESCOBAR
SECRETARY

JOSE RAFAEL MACHUCA ZELAYA
SECRETARY

RENE MARIO FIGUEROA FIGUEROA
SECRETARY

REYNALDO QUINTANILLA PRADO
SECRETARY

PRESIDENT's RESIDENCE:
San Salvador, March 22, 1993
FOR PUBLICATION,

ALFREDO FELIX CRISTIANI BURKARD,
President of the Republic

OSCAR ALFREDO SANTAMARIA,
Presidential Minister.

RENE HERNANDEZ VALIENTE,
Minster of Justice

Decree N° 486, dated March 20, 1993,
published in the Official Gazette, N° 56,
Volume 318, on March 22, 1993.

Subject: HUMAN RIGHTS
Subject: Human Rights
Agency: LEGISLATURE
Status: Current
Type: Legislative Decree
N°: 486
Official Gazette: 56

Date: March 20/93
Volume: 318

Published in the
Official Gazette:
March 22, 1993

Amendments: none
Comments:

Certification

I certify that the foregoing document in English, "Law of General Amnesty for the Consolidation of Peace," is a true and correct translation of the attached document in Spanish, "Ley de Amnistia General para la Consolidacion de la Paz."

/s/ Eva Desrosiers
Eva Desrosiers
Federally Certified
Court Interpreter

Alexandria:
Virginia:

Eva Desrosiers subscribed the foregoing before me this 23 Oct., 2008.

/s/ Jennifer Ayers Jones
NOTARY PUBLIC

My Commission Expires: _____

[Commonwealth of Virginia
Jennifer Ayers Jones - Notary Public
Commission ID: 271236
My Commission Expires 03/31/2010]

LEY DE AMNISTIA GENERAL PARA LA CONSOLIDACION DE LA PAZ

DECRETO Nº 486.

LA ASAMBLEA LEGISLATIVA DE LA REPUBLICA DE EL SALVADOR,

CONSIDERANDO:

I.- Que el proceso de consolidación de la paz que se impulsa en nuestro país, demanda crear confianza en toda la sociedad, con el fin de alcanzar la reconciliación y reunificación de la familia salvadoreña, mediante la adopción de disposiciones legales de ejecución inmediata, que garanticen a todos los habitantes de la República el desarrollo pleno de sus actividades en un ambiente de armonía, respeto y confianza para todos los sectores sociales;

II.- Que con fecha ventitrés de enero de mil novecientos noventa y dos, la Asamblea Legislativa aprobó la Ley de Reconciliación Nacional, contenida en el Decreto Legislativo Número 147, publicado en el Diario Oficial Número 14, Tomo 314 de la misma fecha; mediante dicho decreto se concedió amnistía con restricciones a todas las personas responsables en cualquier forma, en la comisión de delitos políticos, comunes conexos con éstos y en delitos comunes cometidos por un número de personas que no baje de veinte, antes del 1° de enero de mil novecientos noventa y dos;

III.- Que las restricciones a que se hace referencia en el considerando anterior, no permitieron una

aplicación general de la Ley de Reconciliación Nacional para todas las personas que, independientemente del sector a que pertenecieron en el conflicto armado, hayan participado en hechos de violencia que dejaron huella en la sociedad, creándose una situación de falta de equidad que es necesario corregir, ya que no es compatible con el desarrollo del proceso democrático ni con la reunificación de la sociedad salvadoreña;

IV.- Que para impulsar y alcanzar la reconciliación nacional, es conveniente conceder la gracia de amnistía amplia, absoluta e incondicional, a favor de todas las personas que en cualquier forma hayan participado en hechos delictivos ocurridos antes del primero de enero de mil novecientos noventa y dos, ya se trate de delitos políticos o comunes conexos con éstos o delitos comunes cometidos por un número de personas que no baje de veinte, comprendiendo aquellas personas contra quienes se hubiere dictado sentencia, iniciado procedimiento por los mismos delitos o no existiere procedimiento alguno en su contra, siendo extensiva la gracia a las personas no incluidas en la Ley de Reconciliación Nacional hayan participado como autores inmediatos, mediatos o cómplices en los mismos hechos delictivos;

POR TANTO,

en uso de sus facultades constitucionales y a iniciativa de los Diputados Luis Roberto Angulo Samayoa, Ciro Cruz Zepeda Peña, José Rafael Machuca Zelaya, Rafael Antonio Morán Orellana, Carlos Remberto González, José Roque Calles

Amaya, Marcos Alfredo Valladares, Carlos Rene Calderón y Julio Angel Sorto,

DECRETA la siguiente:

LEY DE AMNISTIA GENERAL PARA LA CONSOLIDACION DE LA PAZ

Art. 1.- Se concede amnistía amplia, absoluta e incondicional a favor de todas las personas que en cualquier forma hayan participado en la comisión de delitos politicos, comunes conexos con éstos y en delitos comunes cometidos por un número de personas que no baje de veinte antes del primero de enero de mil novecientos noventa y dos, ya sea que contra dichas personas se hubiere dictado sentencia, se haya iniciado o no procedimiento por los mismos delitos, concediéndose esta gracia a todas las personas que hayan participado como autores inmediatos, mediatos o cómplices en los hechos delictivos antes referidos. La gracia de la amnistía se extiende a las personas a las que se refiere el artículo 6 de la Ley de Reconciliación Nacional, contenida en el Decreto Legislativo Número 147, de fecha veintitrés de enero de mil novecientos noventa y dos y publicado en el Diario Oficial Número 14, Tomo 314 de la misma fecha.

Art. 2.- Para los efectos de esta Ley además de los especificados en el artículo 151 del Código Penal, se considerarán también como delitos políticos los comprendidos en los artículos del 400 al 411 y del 460 al 479 del mismo Código, y los cometidos con motivo o como consecuencia del conflicto armado, sin

que para ello se tome en consideración la condición, militancia, filiación o ideología política.

Art. 3.- No gozarán de la gracia de amnistía:

a) Los que individual o colectivamente hubiesen participado en la comisión de los delitos tipificados en el inciso segundo del artículo 400 del Código Penal, cuando éstos lo fuesen con ánimo de lucro, encontrándose cumpliendo o no penas de prisión por tales hechos; y

b) Los que individual o colectivamente hubieren participado en la comisión de delitos de secuestro y extorsión tipificados en los artículos 220 y 257 del Código Penal y los comprendidos en la Ley Reguladora de las Actividades Relativas a las Drogas, ya sea que contra ellos se haya iniciado o no procedimiento o se encontraren cumpliendo penas de prisión por cualquiera de estos delitos, sean o no conexos con delitos políticos.

Art. 4.- La gracia de amnistía concedida por esta ley producirá los efectos siguientes:

a) Si se tratare de condenados a penas privativas de libertad, el juez o tribunal que estuviere ejecutando la sentencia, decretará de oficio la libertad inmediata de los condenados, sin necesidad de fianza; igual procedimiento aplicará el Tribunal que estuviere conociendo, aún cuando la sentencia no estuviere ejecutoriada;

b) Si se tratare de ausentes condenados a penas privativas de libertad, el Juez o Tribunal competente, levantará de oficio inmediatamente las órdenes de captura libradas en contra de ellos, sin necesidad de fianza;

c) En los casos de imputados con causas pendientes, el Juez competente decretará de oficio el sobreseimiento sin restricciones a favor de los procesados por extinción de la acción penal, ordenando la inmediata libertad de los mismos;

ch) Si se tratare de personas que aún no han sido sometidas a proceso alguno, el presente decreto servirá para que en cualquier momento en que se inicie el proceso en su contra por los delitos comprendidos en esta amnistía, puedan oponer la excepción de extinción de la acción penal y solicitar el sobreseimiento definitivo; y en el caso de que fueren capturadas, serán puestas a la orden del Juez competente para que decrete su libertad;

d) Las personas que no se encuentren comprendidas en los literales anteriores y que por iniciativa propia o por cualquier otra razón deseen acogerse a la gracia de la presente amnistía, podrán presentarse a los Jueces de Primera Instancia respectivos, quienes vistas las solicitudes extenderán una constancia que contendrá las razones por las que no se les puede restringir a los solicitantes

sus derechos que les corresponden como ciudadanos; y

e) La amnistía concedida por esta ley, extingue en todo caso la responsabilidad civil.

Art. 5.- Sin perjuicio de lo dispuesto en los literales a), b) y c) del artículo anterior, las personas que estén procesadas y deseen acogerse a los beneficios de la presente ley, dirigirán solicitud por escrito, ya sea personalmente o por medio de apoderado, o se presentarán a los Jueces de Primera Instancia, pidiendo que se dicte en su favor el sobreseimiento correspondiente, el Juez competente, de ser procedente, dictará el sobreseimiento, el cual será sin restricciones y sin necesidad de fianza.

Las solicitudes también se podrán presentar ante los Jueces de Paz, Gobernadores Departamentales, Alcaldes Municipales y Cónsules acreditados en el exterior, quienes inmediatamente después las remitirán al Juez de Primera Instancia respectivo, para que les dé el trámite correspondiente.

A los funcionarios indicados en este artículo que no cumplan con dicha obligación, el juez competente les impondrá una multa de Un Mil a Cinco Mil Colones, siguiendo el procedimiento que establece el artículo 718 del Código Procesal Penal.

Art. 6.- Deróganse todas las disposiciones que contraríen la presente ley, especialmente el Art. 6 y el último inciso del Art. 7, ambos de la Ley de Reconciliación Nacional, así como la interpretación auténtica de la primera de las disposiciones citadas

que están contenidas respectivamente, en el Decreto N° 147 del 23 de enero de 1992, publicado en el Diario Oficial N° 14, Tomo 314 de la misma fecha y Decreto N° 164 de fecha 6 de febrero del mismo año, publicado en el Diario Oficial N° 26, Tomo 314 del 10 de febrero de 1992.

Art. 7.- El presente decreto entrará en vigencia ocho días después de su publicación en el Diario Oficial

DADO EN EL SALON AZUL DEL PALACIO LEGISLATIVO: San Salvador, a los veinte días del mes de marzo de mil novecientos noventa y tres.

LUIS ROBERTO ANGULO SAMAYOA
PRESIDENTE
CIRO CRUZ ZEPEDA PEÑA
VICEPRESIDENTE
RUBEN IGNACIO ZAMORA RIVAS
VICEPRESIDENTE
MERCEDES GLORIA SALGUERO GROSS
VICEPRESIDENTE
RAUL MANUEL SOMOZA ALFARO
SECRETARIO
SILVIA GUADALUPE BARRIENTOS ESCOBAR
SECRETARIA
JOSE RAFAEL MACHUCA ZELAYA
SECRETARIO
RENE MARIO FIGUEROA FIGUEROA
SECRETARIO
REYNALDO QUINTANILLA PRADO
SECRETARIO

CASA PRESIDENCIAL: San Salvador, a los veintidós días del mes de Marzo de mil novecientos noventa y tres.

PUBLIQUESE,
ALFREDO FELIX CRISTIANI BURCKARD
Presidente de la República
OSCAR ALFREDO SANTAMARIA,
Ministro de la Presidencia.

RENE HERNANDEZ VALIENTE,
Ministro de Justicia.

D.L. N° 486, del 20 de marzo de 1993, publicado en el D.O. N° 56, Tomo 318, del 22 de marzo de 1993.

Matería: DERECHOS HUMANOS
Matería: Derechos Humanos
Dependencia: ORGANO LEGISLATIVO
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No. 08-1467

In The
Supreme Court of the United States

NICOLAS CARRANZA,
Petitioner,

v.

ANA CHAVEZ, CECILIA SANTOS, JOSE CALDERON, ERLINDA FRANCO, AND DANIEL ALVARADO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Should a United States court exercise jurisdiction over claims asserted by United States and foreign citizens against a United States citizen pursuant to the Alien Tort Statute, 28 U.S.C. Sec. 1350, and the Torture Victim Protection Act, Note to 28 U.S.C. Sec. 1350, when the defendant might be immune from suit in El Salvador based upon a Salvadoran law that provides amnesty from claims brought in El Salvador?

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STATEMENT OF THE CASE

I. Facts of this case.

A United States jury found Nicolas Carranza liable for his role in gross human rights violations, including torture of the plaintiffs, extrajudicial killing of the plaintiffs' relatives, and crimes against humanity, and awarded the plaintiffs compensatory and punitive damages. Carranza now seeks to avoid this liability.

For a further statement of the facts of this case, Respondents hereby incorporate by reference the "Background" section of the opinion rendered in this case by the United States Court of Appeals for the Sixth Circuit. (App. to Pet. for Writ of Cert. 3a-5a.)

II. Proceedings in this case.

Before beginning the trial on the merits, the United States District Court for the Western District of Tennessee ruled as a matter of law that the case should not be dismissed on comity grounds. The court ruled that the Salvadoran Amnesty Law neither prohibits legal claims filed outside El Salvador nor conflicts with the Alien Tort Statute, 28 U.S.C. Sec. 1350 ("ATS"), or the Torture Victim Protection Act, Note to 28 U.S.C. Sec. 1350 ("TVPA"). (App. to Pet. for Writ of Cert. 81a-93a.)

At no time during the district court proceedings did Carranza satisfy his burden of proving the affirmative defense that the Salvadoran Amnesty Law barred the plaintiffs from bringing their claims in a United States court. Carranza did not even submit the text of the Salvadoran Amnesty Law to the court in support of his

pre-trial dispositive motions or at any time during the trial in this case. Throughout the proceedings, Carranza failed to present any evidence to prove his entitlement to amnesty in the United States or even in El Salvador. Indeed, Carranza now argues that the amnesty law does not necessarily apply to cases, such as this one, that involve "fundamental human rights." (Pet. for Writ of Cert. 12.)

At the conclusion of the trial, which took place over the course of three weeks in 2005, the jury returned a six million dollar verdict in favor of Plaintiffs Cecilia Santos, Jose Calderon, Erlinda Franco, and Daniel Alvarado ("Plaintiffs"). (App. to Pet. for Writ of Cert. 28a-30a.) Following the trial, the district court denied Carranza's motion for judgment notwithstanding the verdict, new trial, and/or remittitur. (*Id.* at 25a-51a.) Carranza appealed the district court's decision to the Sixth Circuit.

In his appellate brief, Carranza argued that "[t]he Standard of Review regarding the application of the Doctrine of Comity is whether or not the Court abused its discretion in failing to apply the Doctrine of Comity." Carranza thereby waived his right to claim at this stage that the Sixth Circuit should have applied a de novo standard of review to the district court's comity analysis.

The Sixth Circuit heard oral argument by the parties and by amicus, the Republic of El Salvador, on October 28, 2008. At oral argument, counsel for the Republic of El Salvador reluctantly admitted that the United States Department of State did not accept his request to participate in the appeal.

The Sixth Circuit unanimously affirmed the jury's verdict on March 17, 2009. (App. to Pet. for Writ of Cert. 1a-24a.)

REASONS FOR DENYING THE PETITION

I. Carranza does not allege any Rule 10 reason for granting his petition for certiorari.

Nicolas Carranza's petition for certiorari fails to state any reason set forth in Rule 10 of the Rules of the United States Supreme Court to justify granting his petition. Carranza has merely petitioned this Court to right what he incorrectly believes to be a misapplication of a properly stated rule of law.

Carranza's petition does not, and cannot, claim (1) that any decisions of the United States courts of appeals are in conflict on the issues presented by his petition, (2) that any such conflict exists between the decisions of the courts of appeals and any decision of a state court of last resort, (3) that the decisions of the lower courts in this matter decided an important question of federal law that has not been, but should be, decided by this Court, or (4) that the lower courts' decisions conflict with any relevant decisions of this Court. *See* SUP. CT. R. 10.

Carranza cannot allege any relevant splits in judicial authority because the law of international comity, which lies at the foundation of Carranza's petition, is well-settled in the United States. As this Court has held, principles of international comity do not affect a United States court's application of domestic law where there is no true conflict between such law and any relevant foreign law. *Hartford Fire*

Ins. Co. v. Cal., 509 U.S. 764, 798-99 (1993); *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 555 (1987) ("[T]he threshold question in a comity analysis is whether there is in fact a true conflict between domestic and foreign law.") (Blackmun, J., concurring in part and dissenting in part); *see also In re Simon*, 153 F.3d 991, 999 (9th Cir. 1998) ("[G]eneral principles of international comity . . . [a]re limited to cases in which 'there is in fact a true conflict between domestic and foreign law.'"); *In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1049 (2d Cir. 1996) ("International comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction."). Carranza does not question *Hartford Fire*'s authority or suggest that the lower courts have divided when interpreting it. Carranza merely argues that the Sixth Circuit misapplied *Hartford Fire* to the facts of this case.

Carranza similarly does not allege any split in judicial authority concerning the prudential considerations that guide a court's decision whether to apply United States law when confronted with an allegedly conflicting foreign law. Rather, Carranza appropriately cites this Court's 2004 decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), as the authority enumerating such considerations.

Unable to allege any split in judicial authority related to the issues he presented to the district court and the Sixth Circuit Court of Appeals, Carranza merely seeks a reversal of the Sixth Circuit's decision, which he claims misapplied the precedents this Court set forth in *Hartford Fire* and *Sosa*. As Rule 10 makes clear, however, a "petition for a writ of certiorari is

rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." SUP. CT. R. 10.

Having stated no Rule 10 reason for granting a petition for certiorari and relying merely on the assertion that the Sixth Circuit's decision misapplied the well-settled law of international comity, Carranza's petition should be denied.

II. The jurisdiction granted by the ATS and TVPA extends to this case.

Carranza's assertion that the jurisdiction granted by the ATS and TVPA does not extend to this case ignores the clear language of both statutes and the facts at the heart of this case. Moreover, Carranza's attempt to overcome the weakness of his jurisdictional argument by simultaneously arguing that he is protected by the Salvadoran Amnesty Law for the purpose of the comity analysis and unprotected by the same law for the purpose of an untimely exhaustion of remedies defense is inherently contradictory and without merit.

The TVPA creates a civil cause of action for damages against any person who "subjects an individual to torture . . . or subjects an individual to extrajudicial killing." Note to 28 U.S.C. Sec. 1350.

The ATS provides courts in the United States with jurisdiction over claims by aliens injured by a tort "committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. Sec. 1350. As stated in this Court's decision in *Sosa v. Alvarez-Machain*, Congress's enactment of the TVPA

confirmed the jurisdictional reach of the ATS to encompass claims based upon torture and extrajudicial killing. 542 U.S. 692, 727-28 (2004).

In *Sosa*, this Court meticulously reviewed the history of the ATS. *Id.* at 712-38. For nearly two hundred years following its enactment, the ATS conferred jurisdiction over only three widely-accepted common law causes of action: violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 712, 724. When Congress passed the TVPA, however, it confirmed the federal courts' recent articulation of a broader jurisdictional reach for the ATS. The TVPA provides "a clear mandate . . . that establishes an unambiguous and modern basis for federal claims of torture and extrajudicial killing." *Id.* at 727-28.

Plaintiffs Cecilia Santos and Daniel Alvarado were brutally tortured in El Salvador, and both Erlinda Franco's husband and Jose Calderon's father were murdered by the Salvadoran military. The jury found the torture of Alvarado and the assassination of Franco to be crimes against humanity. In light of *Sosa*, Carranza's claim that the ATS and TVPA do not extend to Plaintiffs' claims simply rings hollow. To the contrary, Congress expressly intended the acts inflicted upon Plaintiffs to lie at the very core of these two statutes.

Carranza attempts to sidestep *Sosa*'s straightforward holding on the jurisdictional reach of the ATS by focusing not on the language of the two statutes or the facts underlying Plaintiffs' claims but, rather, on considerations of comity and "full faith and credit." Such considerations, which will be addressed

in subsequent sections of this brief, have no bearing upon the jurisdiction granted by the ATS and the TVPA. Simply put, this suit was brought in a United States court by United States citizens and aliens against a United States citizen pursuant to two United States statutes expressly intended to address torture and murder. The jurisdiction granted by the ATS and TVPA clearly extends to this case.

In a further attempt to overcome the weakness of his jurisdictional argument, Carranza alternately asserts the jurisdiction of the TVPA does not extend to this case because Plaintiffs failed to exhaust their Salvadoran remedies before initiating this action. During the proceedings at the district court level, however, Carranza conceded that Plaintiffs' Salvadoran remedies had been exhausted because the Salvadoran Amnesty Law would bar all suits against Carranza in El Salvador. Having already conceded this point, Carranza has waived and cannot now assert his right to an exhaustion defense. Even if Carranza had not waived his exhaustion defense, he could not now simultaneously claim to be protected by the Salvadoran Amnesty Law for the purpose of his comity analysis and unprotected by the Salvadoran law for the purpose of an exhaustion defense.

III. This Court's decision in *F. Hoffman-LaRoche v. Empagran* does not support Carranza's petition for certiorari.

Carranza's reliance on *F. Hoffman-LaRoche v. Empagran*, 542 U.S. 155 (2004), upon which he bases the first of his two arguments for granting his petition, is misplaced both factually and legally.

Empagran concerned the application of the Foreign Trade Antitrust Improvements Act ("FTAIA") to alien plaintiffs seeking to use United States courts to redress anticompetitive conduct that caused only foreign injury. *Id.* at 158. In *Empagran*, plaintiff citizens of the Ukraine, Australia, Ecuador and Panama each bought vitamins from defendants wholly outside of the United States and then attempted to bring price-fixing claims in United States courts under the authority of the Sherman Act. *Id.* at 159-160.

With no explanation or justification, Carranza asserts that *Empagran* "describes perfectly [Plaintiffs], in the context of anti-trust instead of tort." (Pet. for Writ of Cert. 17.) Even the most cursory comparison of the *Empagran* facts to the facts in this case reveals how dramatically Carranza overstates his point. As Carranza notes, *Empagran* dealt solely with "claims that included foreign conduct with strictly foreign repercussions." (*Id.* at 16.) In contrast, Plaintiffs' case against Carranza includes two United States citizens suing a United States citizen under the authority of two United States statutes that grant domestic remedies to Plaintiffs that in no way affect El Salvador's legal regime. Far from exactly describing Plaintiffs, the *Empagran* facts describe a scenario bearing little, if any, relevance to Plaintiffs' case.

Empagran's legal analysis is also irrelevant to Plaintiffs' case. The FTAIA expressly excludes from the Sherman Act's reach much anticompetitive conduct that causes only foreign injury, and the Court's opinion is entirely concerned with Congress's express intent for the Sherman Act not to apply to a subset of foreign commercial activity. *See Empagran*, 542 U.S. at 158. The ATS and TVPA contain no comparable territorial

limitation. To the contrary, both statutes expressly grant access to the federal courts to plaintiffs seeking to redress torture and extrajudicial killings that took place in foreign nations. As the Sixth Circuit held in its opinion below, "*Empagran* is of little relevance to the law at issue in this case." (App. to Pet. for Writ of Cert. 15a.) The defendant's interpretation of *Empagran* would eviscerate the intent, purpose, meaning, and scope of the two statutes.

IV. International comity principles do not require this Court to reverse the Sixth Circuit.

A. Carranza cannot invoke international comity principles in his defense because he did not prove his entitlement to amnesty under the Salvadoran Amnesty Law.

International comity principles could not have affected the district court's exercise of jurisdiction over Plaintiffs' claims because Carranza failed to prove he would have been entitled to amnesty if Plaintiffs had sued him in El Salvador.

Any defendant asserting an amnesty defense bears the burden of proving entitlement to the amnesty because the protection of a law of general amnesty functions as an affirmative defense. *See Dixon v. United States*, 548 U.S. 1, 8 (2006) (noting that the common law burden of proving affirmative defenses rests on the defendant); *cf. Crawford-El v. Britton*, 523 U.S. 574, 587 (1998) ("[Q]ualified immunity is an affirmative defense and . . . the burden of pleading it rests with the defendant.") (quotations omitted);

Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982) ("The burden of justifying absolute immunity rests on the official asserting the claim."). As with any affirmative defense, if a defendant does not prove his or her entitlement to be covered by an amnesty law, a plaintiff's claims against him or her will not be barred, and the defendant will have to stand trial.

Throughout the proceedings in the district court, Carranza ignored his burden of proof. Carranza never introduced facts into the record to prove his entitlement to amnesty and, remarkably, never even entered the text of the Salvadoran Amnesty Law into the record as evidence.[1] Moreover, Carranza now suggests in his petition for certiorari that he could stand trial for his actions in El Salvador. In response to the Sixth Circuit's "speculation" that Plaintiffs' claims against him would be barred in El Salvador, Carranza's petition counters that "the Supreme Court of El Salvador has specifically inferred the discretion of Salvadoran courts to waive the immunity of the Amnesty Law in particular cases involving 'fundamental human rights.'" (Pet. for Writ of Cert. 12.) By suggesting today that he might not be protected by the Salvadoran Amnesty Law were he to be sued for the same or similar acts in El Salvador, Carranza highlights his failure to prove his entitlement to an amnesty defense.

---

[1] The full text of the Salvadoran Amnesty Law was submitted in this case only after the Sixth Circuit specially requested a copy of the law from the defendant just days before oral argument on appeal.

Carranza also misleads this Court by suggesting that the lower courts equitably tolled the statute of limitations in this case due to his immunity from suit. The equitable tolling decision was grounded completely in evidence of continuing violence in El Salvador that prohibited Plaintiffs from safely pursuing their case. It was not based in any way upon Carranza proving his entitlement to immunity. (App. to Pet. for Writ of Cert. 10a-12a.)

Carranza further misleads this Court by suggesting the district court prevented him from proffering the only expert intended to testify to the effect of the Salvadoran Amnesty Law. (Pet. for Writ of Cert. 10.) The district court prevented Dr. David Escobar Galindo from testifying to the jury because his proposed testimony was simply a legal conclusion resolving an ultimate issue at trial, which is not an appropriate subject for expert testimony. (App. to Pet. for Writ of Cert. 37a. (citing *Berry v. City of Detroit*, 25 F.3d 1342, 1353-54 (6th Cir. 1994)).) Dr. Galindo was not proffered as a fact witness, and Carranza cannot now suggest that Galindo's exclusion prevented Carranza from convincing the Court that the Salvadoran Amnesty Law would have applied to him in El Salvador.

Because Carranza never proved that the Salvadoran Amnesty Law would have barred Plaintiffs' claims against him if their claims had been brought in El Salvador, principles of international comity did not need to be addressed by the lower courts and do not need to be revisited by this Court.

B. Carranza cannot invoke international comity principles because the ATS and TVPA do not conflict with the Salvadoran Amnesty Law.

Even if Carranza had met his burden of proving his entitlement to amnesty under the Salvadoran Amnesty Law, comity principles would not have affected the district court's exercise of jurisdiction over Plaintiffs' claims because the Salvadoran Amnesty Law does not conflict with the ATS or TVPA.

The issue of comity only arises when "there is in fact a true conflict between domestic and foreign law." *Hartford Fire*, 509 U.S. at 798 (quotation omitted); *see also Societe Nationale Industrielle Aero*, 482 U.S. at 555. There is no conflict for comity purposes "where a person subject to regulation by two states can comply with the laws of both." *Hartford Fire*, 509 U.S. at 799 (citation omitted). The current case complied with both the Salvadoran Amnesty Law and the ATS and TVPA because the Salvadoran Amnesty Law does not prohibit legal claims filed outside El Salvador.

As the Sixth Circuit stated in its opinion below, a "statute must not be interpreted as having extraterritorial effect without a clear indication that it was intended to apply outside the country enacting it." (App. to Pet. for Writ of Cert. 14a.) Nowhere in the text of the Salvadoran Amnesty Law does the Salvadoran legislature indicate an intent for the law to apply extraterritorially, nor did Carranza attempt to prove otherwise. (*Id.* at 110a-115a.) Seeing no evidence of exterritorial intent in the plain language of the amnesty law, the district court properly rejected Carranza's comity analysis, and the Sixth Circuit

properly affirmed the district court's ruling. (*Id.* at 14a, 90a.)

In holding that the Salvadoran Amnesty Law cannot be construed to apply extraterritorially, the Sixth Circuit cited the decision in *BMW Stores, Inc. v. Peugeot Motors of America, Inc.*, 860 F.2d 212, 215 n.1 (6th Cir. 1988). In *BMW Stores*, the statute at issue protected car dealers within Kentucky and did not have any language indicating it was intended to protect dealers extraterritorially. *Id.* at 214. The Sixth Circuit affirmed the principle that "unless the intent to have a statute operate beyond the limits of the state or country is clearly expressed or indicated by its language, purpose, subject matter, or history, no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state or country enacting it." *Id.* at 215 n.1. No such language appears in the Salvadoran Amnesty Law. (App. to Pet. for Writ of Cert. 110a-115a.)

The Salvadoran Amnesty Law, therefore, does not apply extraterritorially, and Carranza can stand trial in the United States under the jurisdiction of the ATS and TVPA without conflicting with the amnesty law in El Salvador. Accordingly, there is no basis to apply a comity analysis in this case.

C. Even if international comity principles applied to Plaintiffs' claims, the practical consequences of letting the Sixth Circuit's decision stand do not provide adequate grounds to grant Carranza's petition.

Unable to present any reason for this Court to grant his petition, Carranza seizes upon the "practical consequences" language of the *Sosa* decision as a predicate to articulate a wholly unsubstantiated "parade of horribles." Carranza's assessment of the practical consequences of letting the Sixth Circuit's opinion stand should be rejected because his analysis (1) is not supported by the facts and (2) relies wholly upon facts that are not the proper subject of judicial notice.

1. Carranza's speculation about the practical consequences of letting the Sixth Circuit's decision stand is not supported by recent history or the facts of Plaintiffs' case.

Carranza claims, without support, that his petition should be granted because the district court's decision "undermines the very vehicle of El Salvador's transformation from a war torn charnel house to a robust democracy." (Pet. for Writ of Cert. 17.) Carranza fails to mention, however, that the Salvadoran democracy has grown more robust over the past decade even while courts in the United States have tried multiple prominent Salvadorans for torture and murder pursuant to the ATS and TVPA.

In 1999, a representative of the estates of three American nuns and one lay worker who were murdered by members of the Salvadoran National Guard invoked the ATS and TVPA to sue the former director of the Salvadoran National Guard and the former Salvadoran Minister of Defense for their murders. *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). After a much-publicized trial, the jury issued a verdict in the officers' favor, which was later affirmed by the Eleventh Circuit. *Id.* at 1287.

A few years ater, the United States District Court for the Eastern District of California entered a ten million dollar judgment against Alvaro Rafael Saravia for his role in the assassination of Salvadoran Archbishop Oscar Romero. *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004). Archbishop Romero, one of the most important critics of the rampant human rights abuses in El Salvador, had implored the military to lay down their arms and stop murdering Salvadoran citizens days before he was killed. *Id.* at 1121. As in *Ford*, the *Saravia* claims were based upon the ATS and TVPA. *Id.* at 1142.

The ATS and TVPA were, again, the bases of claims against former leaders of the Salvadoran military in *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006). In *Arce*, a federal jury awarded over 54 million dollars to three Salvadoran refugees who had been subjected to torture by members of the Salvadoran military between 1979 and 1983. *Id.* at 1256. Like Carranza, the two defendants in *Arce* were top commanders in the Salvadoran military during that period. *Id.* The Eleventh Circuit affirmed the verdict. *Id.*

Each of these trials was conducted publicly with significant media attention in the United States and El Salvador. The courts' exercise of jurisdiction and refusal to defer to the Salvadoran amnesty over the past ten years has not undermined the Salvadoran peace or impaired the growth of democracy in El Salvador.

Not only has Carranza failed to allege or demonstrate any negative effect in El Salvador as a result of these prior cases, he has also failed to demonstrate that the well-publicized verdict in his own case, which was announced over three years ago, has had any adverse effect in El Salvador. To the contrary, Carranza points to the recent election and installation of FMLN candidate Mauricio Funes to the presidency of El Salvador as a testament to the vitality of El Salvador's democracy. (Pet. for Writ of Cert. 8, 12.) Carranza cannot reasonably argue that his case or the earlier three cases discussed above grievously damaged the peace and stability of El Salvador while simultaneously heralding the vitality of the Salvadoran democracy and civil society. Obviously, such cases have not destroyed the peace and democracy of El Salvador.

Carranza also claims that if this Court were to deny his petition, "[r]elations between the United States and El Salvador would suffer as well as those of the United States with every other country that would perceive the blatant violation of El Salvador's sovereignty that is the lower courts' decision." (*Id.* at 23.) Carranza offers no support for this statement. Moreover, when questioned on this point in oral argument, counsel for amicus, the Republic of El Salvador, admitted that the United States Department

of State did not accept his request to participate in the appeal of this matter.[2] The State Department's decision not to participate in this case simply does not comport with Carranza's claim that the exercise of jurisdiction by the district court has harmed or will harm United States relations with El Salvador and the international community.

2. Carranza's speculation relies on an abuse of the judicial notice doctrine.

In support of the assertions refuted above, Carranza relies heavily, and improperly, on the doctrine of judicial notice. In six different footnotes, Carranza asks this Court to take judicial notice of internet documents that are not a part of the record in this case. Plaintiffs would have vehemently challenged the use of these documents at trial, and their judicial notice at this stage in the litigation is wholly inappropriate.

Carranza's petition cites an article posted on www.america.gov for the proposition that the United States considers the amnesty to be critical to El Salvador's peace. (*Id.* at 6.) Later, Carranza cites a website purporting to present a decision of the Supreme Court of El Salvador for the proposition that Carranza may not be protected by the Salvadoran Amnesty Law. (*Id.* at 12.) On four other occasions,

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[2] Considering the State Department's rejection of Carranza's request to intervene, Carranza's argument that this case should be left to the political branches should not be given weight. Moreover, because Carranza did not raise "political question" justiciability concerns at any stage of the district court proceedings, he cannot do so at this point in the litigation.

Carranza presents the Court with articles intended to establish (1) the United States' estimate of the Salvadoran war's death toll, (2) the political affiliations of Ruben Zamora, (3) the results of the most recent Salvadoran election, and (4) the outcome of the trial of two Salvadoran guerillas. (*Id.* at 3, 5, 12, 24.)

Federal Rule of Evidence 201 allows for judicial notice only when the facts proffered are "not subject to reasonable dispute." FED. R. EVID. 201(b). Plaintiffs would have challenged the admissibility of each of the documents discussed above and would have strenuously challenged a number of the facts Carranza asserts are contained therein. Carranza simply cannot foist such "proof" upon the Court at this stage in the litigation for assertions that are totally unsupported by evidence in the record.

CONCLUSION

For the foregoing reasons, Nicolas Carranza's petition for certiorari should be denied.

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In The
Supreme Court of the United States

NICOLAS CARRANZA,

Petitioner,

v.

ANA PATRICIA CHAVEZ, CECILIA SANTOS, JOSE FRANCISCO CALDERON, ERLINDA FRANCO, DANIEL ALVARADO

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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Respondents' Brief in Opposition ("Br. in Opp.") misstates facts and law.

1. Rule 10 comprises precisely this petition.

The Sixth Circuit cannot be said to have "properly stated [the] rule of law" enunciated in *F. Hoffmann-LaRoche v. Empagram*, 542 U.S. 155 (2004), and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Rather, its decision conflicts with those manifestly relevant decisions by this Court, impelling the granting of a writ pursuant to. Sup. Ct. R. 10(4). *Contra* Br. in Opp. 3-5.

2. Petitioner may assert the Amnesty Law and still plead Respondents' failure to exhaust local remedies.

It was undisputed at trial that the allegations against Petitioner fell within the class of crimes covered by El Salvador's Amnesty Law. Appendix ("App.") 87a-88a. The Salvadoran Supreme Court has inferred the discretion to entertain certain claims within the law's ambit. Nonetheless, Respondents made no attempt to pursue any of their claims before a Salvadoran court. El Salvador is entitled to regulate and provide redress for its own controversies no less than were the foreign countries subject of *Hoffmann*'s proscription against the "legal imperialism" inherent in undermining a foreign country's antitrust regulation by imposing American requirements on conduct with exclusively foreign repercussions. *See Hoffman*, 542 U.S. at 169.

Respondents mislead when they characterize this case as a claim by United States citizens against a United States citizen. See Br. in Opp. 7. At the time of the acts alleged by Respondents, over 20 years before the claims were filed, none of the parties was a United States citizen.

Petitioner never conceded the issue of exhaustion of remedies, *contra* Br. in Opp. 7, but only acknowledged in an earlier appellate brief the trial court's finding that the Amnesty Law granted absolute immunity. App. 87a.

3. Petitioner has no burden to prove the trial court's lack of jurisdiction.

Respondents claim Petitioner failed to meet his burden of proof as to his "affirmative defense" of entitlement to the protections of the Amnesty Law. *See* Br. in Opp. 9-10. In truth, he was prevented by the trial court from presenting evidence to amplify his challenge to the court's jurisdiction when the court refused to hear Dr. Galindo on the law's meaning and provenance. App. 37a.

A federal court's subject matter jurisdiction is not presumed and the burden of establishing it "rests with the party asserting jurisdiction." *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375, 377 (1994), *quoting McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 183-83 (1936). Consequently, the trial court's refusal to hear Dr. Galindo precluded satisfaction of Respondents' burden to establish jurisdiction.

Dr. Galindo's testimony on the law was not, in fact, an "[in]appropriate subject for expert testimony." Br. in Opp. at 11. The Sixth Circuit has more than once affirmed such testimony before a judge alone. *See Johnson v. Ventra Group*, 191 F.3d 732, 742 (6th Cir. 1999).

None the cases cited by Respondents, *see* Br. in Opp. 9-10, remotely touched on foreign amnesties, conflict of laws or comity. *Dixon v. United States*, 458 U.S. 1, 8 (2006), *Crawford-El v. Britton*, 523 U.S. 574, 587 (1998), and *Harlow v. Fitzgerald*, 457 U.S. 800, 811-13 (1982) discuss affirmative defenses available to victims of duress, prison guards, and White House advisers, respectively.

4. The trial court's exercise of jurisdiction is subject to review de novo.

The threshold issue before the trial court, whether the jurisdiction of ATCA and TVPA properly extended to this case, is subject to review *de novo*. *See, e.g.*, *Taveras v. Taveraz*, 477 F.3d 767, 771 (6th Cir. 2007). *Contra* Br. in Opp. 2. The discrete issue of whether or not the Amnesty Law deserved deference as a matter of comity presents only once jurisdiction is affirmed. Nonetheless, the trial court amply abused its discretion in denying comity – by finding "no conflict," App. 36a, between domestic law and the Amnesty Law after refusing to hear the only evidence proffered as to the Amnesty Law's meaning, the testimony of Dr. Galindo, and by ignoring the proscriptions of *Hoffmann* and *Sosa*.

5. Considerations of comity do not turn on a person's inability to obey the law of two countries.

All considerations of comity are not, in fact, presaged upon a circumstance where a person's compliance with the laws of two jurisdictions is impossible. *Contra* Br. in Opp. 12. *Hilton v. Guyot*, 159 U.S. 113, 164 (1895) mentions no such requirement when it describes comity as the "recognition which one nation allows... to the legislative, judicial or executive acts of another."

The lower courts and Respondents, *see* App. 14a, Br. in Opp. 12, both cite *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), to say that any consideration of comity requires a "true conflict" or that a person subject to the laws of two jurisdictions be unable to comply with both. *Hartford* so defines a "true conflict," but also states that "international comity would not counsel against exercising jurisdiction in the circumstances alleged here." *Id.* at 798-800. Consequently, its requirement of a "true conflict" for application of comity sounds in *dictum* rendering it less than binding. Moreover, the decision's ambit does not extend to considerations of comity as to all foreign laws. *Hartford* entailed divergent restrictions on commercial conduct in Britain and the United States and addressed the application of comity to the discrepancy inherent therein. *Hartford* arguably appertains to the application of comity to laws enjoining people by prohibiting certain conduct. The Amnesty Law, however, only enjoins courts by mandating certain protections for people.

A law enjoining only courts is not susceptible to an analysis of whether a person can comply with it-compliance with such a law is the province of a court. Such a law however, should be susceptible to an analysis of whether a court can reconcile its obligations thereunder with those created by another law. In fact, one of the cases cited by Respondents, *In re Maxwell Communication Corp.*, 93 F.3d 1036 (2d Cir. 1996), *see* Br. in Opp. 4, considered discrepancies between American and British bankruptcy laws and found the laws to be in conflict as "it is impossible to distribute the debtor's assets in a manner consistent with both rules." *Id.* at 1050. Even if jurisdiction could be found notwithstanding the prudential considerations of *Hoffmann* and *Sosa*, the ATCA and TVPA, as read by the lower courts, would certainly conflict with the Amnesty Law since the parties' rights could not be determined in a manner consistent with both countries' laws.

6. Extraterritorial application of the Amnesty Law does not require an express reflection of such intent within the Amnesty Law.

A law enjoining only courts cannot mandate any extraterritorial effect. No sovereign can dictate the judicial conduct of another. The insistence of the lower courts and Respondents upon an expression of such intent in the Amnesty Law, *see* App. 14a, Br. in Opp. 13, is mistaken. The case cited, *BMW Stores v. Peugeot*, 860 F.2d 212 (6th Cir. 1988), entailed a

Kentucky law enjoining people by forbidding certain conduct. *Id.* at 213.[1]

7. The proscriptions of Hoffmann and Sosa should have precluded the trial court's jurisdiction.

The expressly extraterritorial intent of the ATCA and TVPA does not diminish *Hoffmann*'s pertinence. *Contra* Br. in Opp. 8-9. *Hoffmann* dealt with the Foreign Trade Antitrust Improvements Act ("FTAIA") which contains an express limitation of its application overseas. Nonetheless, *Hoffmann* relies on broader principles such as the *Restatement Third of Foreign Relations Law of the United States* which proscribe extraterritorial proscriptive jurisdiction and whose pertinence is not limited to the FTAIA.

Moreover, the legislative history of the TVPA reveals Congress's intent that the TVPA not overbear a foreign amnesty since "immunity from suit" is one of the bases specified for tolling the law's 10 year statute of limitations. S. Rep. No. 102-249, at 10-11.

The lower courts and Respondents fail even to mention *Sosa*'s specific admonition against exercising ATCA or TVPA jurisdiction in contravention of the reconciliation of a foreign internal conflict. *See Sosa*, 542 U.S. at 733 n.21.

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[1] It bears noting that the only authority cited by the *BMW* court for its ruling was *American Jurisprudence*. *Id.* at 215 n.1.

8. Petitioner seeks judicial notice only of official documents, not "internet documents."

Every one of the documents subject of Petitioner's request for judicial notice is an official publication of either the United States or the Salvadoran government. *Contra* Br. in Opp. 17. Citations to web references are offered for the convenience of the reader.

9. The silence of the Department of State at this juncture should not prejudice this petition.

The silence of the State Department, *see* Br. in Opp. 2, does not undo its deep involvement with the formulation of the Amnesty Law and its earlier pronouncements of the law's criticality to El Salvador's peace. Rather, the silence implies a continuation of its position that the Amnesty Law was a prerequisite to ending El Salvador's civil war. As the product of an extensive undertaking by a political branch, the Amnesty Law should have been spared the trial court's intrusion. *See First Natl. City Bank v. Banco Nacl. de Cuba*, 406 U.S. 759, 766 (1972).

10. The prudential concerns precluding the exercise of ATCA and TVPA jurisdiction are not limited to circumstances auguring the complete collapse of a foreign nation.

Respondents deride as a "parade of horribles," *see* Br. in Opp. 14, Petitioner's description of the practical consequences of the lower courts' decision. El Salvador's civil war, however, was certifiably horrible. The alternative to the integrity of the Amnesty Law as a pivotal bulwark against armed conflict would, in fact, appear to be horrible. Moreover, no authority suggests that the prudential concerns of *Hoffmann* and *Sosa* or the considerations of comity are implicated only in the most extreme circumstance when a court's action is perceived as likely to destroy another country.[2]

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[2] The lower courts aside, no court has specifically ruled that the Amnesty Law does not preclude jurisdiction under the ATCA or TVPA. Of the earlier decisions cited by Respondents on ATCA or TVPA claims arising from El Salvador's civil war, see Br. in Opp. 15-16, only one, *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1153 (E.D. Cal. 2004), mentions the Amnesty Law. That decision, the product of a default judgment, mentions the law in a discussion of exhaustion of local remedies flawed by the court's unawareness of the Salvadoran Supreme Court's inference of the discretion to consider limited cases arising from the civil war.

CONCLUSION

Respondents' Brief in Opposition offers no good reason to deny the petition.

Respectfully submitted,

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ANA CHAVEZ, CECILIA SANTOS, JOSE CALDERON, ERLINDA FRANCO, and DANIEL ALVARADO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* REPUBLIC OF EL SALVADOR IN SUPPORT OF PETITIONER

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Amicus Curiae of El Salvador respectfully submits this brief in support of Petitioner Nicolas Carranza.[1]

INTEREST OF *AMICUS CURIAE*

The Government of the Republic of El Salvador seeks to have this Court reverse the decision of the United States Court of Appeals for the Sixth Circuit. The decision of the Sixth Circuit to affirm the decision of the United States District Court for the Western District of Tennessee to adjudicate the claims of Respondents, derogates El Salvador's Law of General Amnesty for the Consolidation of Peace, Legislative Decree No. 486, March 20, 1993 ("Amnesty Law"). The Amnesty Law precludes the claims at bar by granting civil and criminal immunity to Petitioner Nicolas Carranza, a former Sub Minister of the Salvadoran Ministry of Defense and Director of the Treasury Police, accused of committing abuses during El Salvador's civil war. The Sixth Circuit's decision transgresses thereby the sovereignty of El Salvador and the will of its people.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than the Republic of El Salvador or its counsel has made a monetary contribution to the preparation or submission of this brief. Counsel for all parties consented in writing to the filing of this brief.

SUMMARY OF ARGUMENT

The decision of the Sixth Circuit impugns El Salvador's sovereignty, contradicts international authority, and undermines El Salvador's democracy.

ARGUMENT

INTRODUCTION

The Amnesty Law was a principal, if not the pivotal, requirement of the peace accords which put an end to El Salvador's civil war that lasted from 1980 until 1992.

The peace accords culminated in the Agreement of Chapultepec of January 16, 1992.

Chapter VI, Section 1, of the agreement, "Political Participation of the FMLN," guarantees to the former guerillas the "full exercise of their civil and political rights in order that they be legally reintegrated into the civil, political and institutional life of the country."

This provision led to the passage of the Amnesty Law which grants "full, absolute and unconditional amnesty" to all who participated in the war – on either side – "toward the end of achieving the reconciliation and reunification of the Salvadoran family... " Secs. IV and I of the Amnesty Law.

The United States Department of State has acknowledged the pivotal role of the Amnesty Law

as a prerequisite to the termination of a war that cost El Salvador 70,000 lives. Moreover, the United States, together with the United Nations and several other countries, was heavily invested in the negotiations which led to the passage of the Amnesty Law and the creation of a peace that endures to this day.[2]

1. International authority supports the Amnesty Law.

Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (1977), calls for amnesties that enable a transition from civil war to peace. "[A]t the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict..." *Id.* at Art. 6(5).

2. The courts of El Salvador are a suitable forum.

Respondents are not absolutely precluded from securing relief in El Salvador. The Supreme

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[2] The casualty figure and the characterization of the amnesty are drawn, respectively, from two publications of the State Department, *Fifteenth Anniversary of the Peace Accords*, Press Statement, January 16, 2007, *available at* http://2001-2009.state.gov/r/pa/prs/ps/2007/78920.htm, and *El Salvador Called Example to World for Healing Wounds of War*, Bureau of International Information Programs, USINFO, January 22, 2007, *available at* http://www.america.gov/st/washfileenglish/2007/January/20070122176141XEneerG0.3538782.html. *Amicus* requests the Court take judicial notice of both official publications pursuant to Fed. R. Evid. 201.

Court of El Salvador has specifically inferred the discretion of Salvadoran courts to waive the immunity of the Amnesty Law in particular cases involving "fundamental human rights." Cases 24-97 and 21-98, Sup. Ct. of El Sal., (Sept. 26, 2000), Sec. VII(2).[3] Rather than seek relief before a Salvadoran court, however, Respondents have sought the more favorable venue of an American court ill equipped to adjudicate events of nearly 30 years ago in Central America. El Salvador, and not the United States, was the locus of the acts alleged, the actors and any harm engendered thereby. Moreover, most of the people able to elucidate those events from first-hand knowledge are beyond the reach of American courts.

The commitment to justice of the Salvadoran courts is not to be dismissed. It bears noting that the sentences of two guerillas convicted of murdering two United States soldiers during the civil war were vacated following passage of the Amnesty Law. Case No. CPS02495.95, Sup. Ct. of El Sal., (Aug. 16, 1995), pp. 1-2.[4]

The organs of government in El Salvador are demonstrably pluralistic, auguring judicial independence. On March 15, the Salvadoran people

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[3] *Available at* http://www.jurisprudencia.gob.sv/Jindice.htm. Search "constitucional," "inconstitucionalidades," "sentencias definitivas," "2000," and "24-97 ac 21-98." *Amicus* requests the Court take judicial notice of the decision pursuant to Fed. R. Evid. 201.

[4] *Available at* http://www.jurisprudencia.gob.sv/exploiis/.%5Cindice.asp?nBD=1&nDoc=22080&nItem=22082&nModo=1. *Amicus* requests the Court take judicial notice of the decision pursuant to Fed. R. Evid. 201.

elected as President, Mauricio Funes of the FMLN. The party of the former guerillas already comprises the largest of several parties in the Salvadoran Legislature and will control the executive branch after the change of government on June 1.[5]

3. The decision of the Sixth Circuit undermines the political stability and democracy of El Salvador.

The adjudication of Respondents' claims by a court geographically and temporally removed from the events in question and with no stake in El Salvador's continuing political harmony, risks decisions at odds with the facts, the intention of El Salvador's elected legislature and the interests of the Salvadoran people.

CONCLUSION

El Salvador's justice and polity are the concerns, first and foremost, of El Salvador – the locus of the acts alleged, the actors and the repercussions. El Salvador, not the United States, suffered the war that the Amnesty Law ended. Only a Salvadoran court should adjudicate claims that implicate the vehicle of its peace.

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[5] CRS Report RS21655, *El Salvador: Political, Economic, and Social Conditions and U.S. Relations*, "2009 Elections," by Claire Seelke and Peter Meyer, *available at* http://fpc.state.gov/documents/organization/121836.pdf. *Amicus* requests the Court take judicial notice of this official publication pursuant to Fed. R. Evid. 201.

Respectfully submitted,

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